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THE
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I.—THE LEGAL POSITION OF ILLEGITIMATE CHILDREN IN GERMANY.

A CHILD whose parents are not married, or the marriage of whose parents may be void according to Article 1324 of the German Civil Code, or whose parents cohabit together where the marriage is a nullity, and of which nullity both parties were aware when they contracted the marriage, is according to German law deemed to be illegitimate. Article 1324 of the Code enacts that a marriage is a nullity if the provisions contained in Article 1317 are not observed. Should the marriage have been entered in the marriage register, and provided the parties have lived together for ten years after the marriage, or in case one of the parties has died before the aforesaid period, and the parties have lived together as husband and wife for a period, at the least, of three years, then the marriage shall be considered as legal from the commencement thereof. This provision is inapplicable, if, at the end of the ten years or at the time of death of one of the spouses, proceedings have been taken for the purpose of having the marriage declared a nullity. Article 1317 enacts that the marriage is entered into by the parties before the Registrar personally and in each other's presence declaring that they desire to marry

each other. The Registrar must be prepared to take the declarations. The declarations cannot be given subject to a condition or to a time limitation.

The illegitimacy of the child may be avoided by legitimation—a declaration that the marriage of which the child is an offspring is valid, by adoption. An illegitimate child has, as respects the mother and her relations, the legal position of a legitimate child, it enters the mother's family as if it were legitimate. It is related to the relatives of the mother and has all the rights appertaining to this relationship, *e.g.*, a claim for maintenance, the right of inheritance, &c. No relationship exists between an illegitimate child and its father, nor between it and the father's relations. Article 1589 of the Code expressly declares that an illegitimate child and its father are not related.

An illegitimate child is entitled to the surname of its mother. Should the mother by reason of her marriage have another name, then the child takes the surname its mother had before the marriage. The husband can, by making a declaration before the proper officials, and with the consent of the child and the mother, give the latter his name. The declaration of the husband as well as the respective declarations of the child and the mother signifying their respective consents, shall be given in public certified form. Thus, where the woman has been married several times, the child obtains the surname which the mother had before her first marriage; therefore, should a woman have been twice divorced, the child will not obtain the surname of the first husband, but its mother's maiden name.

The mother has not the parental control of her illegitimate child. She has the right and the duty to care for the child's person, that is, the right to educate it, to look after it, and to appoint the place where the child shall reside,

but she cannot represent the child. In so far as the mother has the care of the child, the guardian of the child has the legal position of a supplementary guardian.

So long as an illegitimate child is under age a guardian is appointed for it. The putative father may be appointed guardian, so can the mother. Should the illegitimate child become legitimated by the marriage of the father with the mother, or should it be adopted, then the father or the adopter acquires the parental power over the child. It has been a matter of dispute whether a mother of an illegitimate child could adopt it, as adoption is understood in German law, but it is now the general opinion that she can do so and thus give to the child in relationship to herself the legal position of a legitimate child.

According to Article 1708 of the Code, the father of an illegitimate child is bound, till it has ended its sixteenth year, and in such manner as is suitable to the mother's station in life, to maintain it. The maintenance includes the necessaries of life, the costs of education, and preparing the child for an occupation. In case the child shall, in consequence of bodily or mental infirmities at the end of its sixteenth year, not be in a position to maintain itself, then the father has to provide maintenance for it beyond this period, and Article 1603, paragraph 1, is applicable. This paragraph is as follows: a person is not liable to grant maintenance who, when his means or obligations are taken into consideration, is not, having regard to his station in life, in a position to do so without endangering his own existence.

The parents and other relations of the putative father are not bound to provide maintenance for the illegitimate child only in so far as they are liable as heirs of the putative father by virtue of Article 1712 of the German Civil Code, which enacts that the claim to maintenance does not cease with the father's death, the child is entitled

to the same even if the father has died before its birth. The father's heir is entitled to compromise the former's liability by payment of such amount as the child would be entitled to receive as a compulsory portion assuming it were legitimate. Should there be several illegitimate children, then the amount to be paid is calculated as if all the children were legitimate.

The mother cannot, unless she has been appointed a guardian or curator (*Pfleger*) of the child herself, sue the father for the maintenance of her illegitimate child, but a guardian must be appointed for the child, and he must sue the putative father. An exception, however, to this rule is provided by Article 1716 (*infra*) of the Code, which enables the mother herself to take certain proceedings before the birth of the child in order to protect its interests. Article 1709 enacts that the father is liable to maintain his illegitimate child before the mother or her relations. In so far as the mother or one of her relations grants maintenance to the child, the child's claim for maintenance against the father is transferred to the mother or her relations. The transfer of the claim cannot be enforced to the child's prejudice.

As a general rule, the father is alone liable for maintenance, but should he not be able to maintain the child, then the mother and her relations, as aforesaid, are liable to do so, as provided by Article 1601 of the Code, which enacts that relations in the direct line are bound to grant maintenance to one another.

Maintenance is to be provided as in manner mentioned in Article 1710 of the Code, that is to say, by payment of a yearly sum in money; the payment is to be made quarterly, in advance. A payment made in advance for a future time does not free the father from his liability. Such payment can only be made with the consent of the Guardianship Court (Article 1714, *infra*). In case the child was living

at the beginning of the quarter, then the full amount due for the quarter is payable.

The payment must as a rule be made to the guardian, and not to the mother or to a person in whose care the child may be, and Article 1711 of the Code enables past maintenance to be claimed. The claim for maintenance is, according to Article 1713, extinguished by the death of the child, in so far as it is not based upon fulfilment or indemnification on account of the non-payment for past maintenance, or to such payments which were to be made in advance, and which were due at the time of the death of the child. It is the father's duty to pay the costs of the funeral expenses of the child in so far as they are not payable by the child's heirs. The costs of such expenses are to be such as a person in the mother's station in life, at the time of the death of the child, would pay.

Further, it is provided by Article 1714 of the Code, that an agreement between the father and the child as to future maintenance, or an agreement as to the payment of a lump sum in settlement of the father's liability, shall not be made without the consent of the Guardianship Court. A renunciation of maintenance for the future, without payment, is a nullity. The father has no right of appeal from the decision of the Guardianship Court.

According to Article 1715 of the Code, the father is bound to pay to the mother the expenses of the confinement as well as the costs of maintenance for the first six weeks after the confinement, and if by reason of the consequences resulting from pregnancy and confinement, additional expenses should be incurred, then the father is bound to pay the same. The mother is empowered to demand what may be the usual expenses in such a case without taking into consideration the actual outlay she may have been put to. She is also entitled to make the aforesaid claim notwithstanding the father's death before the birth of the child,

or if the child was stillborn. The claim is barred in four years, and time commences to run from the expiration of six weeks after the birth of the child.

The costs of confinement include the doctor's or midwife's fees, medicine, attendance and nursing. The payments to be made for maintenance include such payments as are made for the necessaries of life. The father cannot claim to maintain the mother in kind, *i.e.*, to provide her himself with food or the other usual necessaries of life, and it is immaterial that the mother, before the expiration of the six weeks, is able to follow her usual employment or occupation. Under additional expenses, which the mother has incurred as a consequence of her pregnancy and confinement, are considered such as are incurred in consequence of an illness following the pregnancy or confinement, and include the costs for extra nourishment, *e.g.*, wine, the engagement of a nurse, and the costs incurred to go to the seaside, where this is necessary. It is, however, absolutely essential that the subsequent illness is connected with the pregnancy or confinement, the mere fact that the illness is subsequent to the pregnancy or the confinement is not sufficient. Further, the mother may claim against the father the expenses incurred by her which have arisen in consequence of the pregnancy or confinement after the expiration of the first six weeks of the confinement, owing to her being partly or wholly unable to follow her employment, *e.g.*, if she has had to give up a situation where she obtained free board and lodging and has been compelled to obtain board and lodging with strangers, or go to a hospital, and out of her own means has had to make payments or incurred obligations for the aforesaid reasons. It is, however, doubtful if the mother can claim damages by reason of her working capacity having decreased owing to her pregnancy or confinement, *e.g.*, where she has for the aforesaid reasons had to leave her situation or could not accept a more lucrative situation

which she had in view. The better opinion appears to be that she cannot recover damages in respect of the aforesaid events.

According to Article 1716 of the Code, the Court may on the mother's application make a provisional order against the father, that he shall, immediately after the birth of the child, pay to its mother or guardian the necessary amount for maintaining the child for the first three months after its birth, and shall lodge the sum directed by the order to be paid a reasonable time before the child's birth. In the same manner the Court may, on the application of the mother, order that the payment of the usual sum for the costs, as provided in Article 1715, paragraph 1 (*supra*), shall be paid to her, and for lodgment of this amount. It is not necessary to prove, for the issue of the provisional order, that there is a likelihood of the claim being endangered.

The Court will, as a general rule, grant the mother's application, but it is not bound to do so. It is in the Court's discretion to fix the time as to when the necessary amount must be deposited. The mother can make the application personally, even though, as has hereinbefore been stated, she cannot represent the child, and it is unnecessary for her to appoint a curator (*Pfleger*). To substantiate or make good her application, she must (1) prove her pregnancy, (2) that the man against whom the application is made is the father of the child.

A person is, within the meaning of Articles 1708 to 1716 (*supra*), deemed to be the father of the child, who within the period of conception has cohabited with the mother, unless another has within the aforesaid period cohabited with her. Cohabitation is not, however, taken into consideration, if, according to the circumstances of the case, it is manifestly impossible that the mother has conceived the child by reason of such cohabitation. The period of conception is taken as from the one hundred and eighty-first day till the three

hundred and second day, both inclusive, before the day of the child's birth. A person who, after the birth of the child, by a public document acknowledges himself to be the father of a child cannot allege that another person has cohabited with the mother during the period of conception.

Article 21 of the Introductory Act to the German Civil Code provides that the father's duty to furnish maintenance to his illegitimate child, and his duty to pay the mother the costs of pregnancy, of confinement, and of maintaining her, are determined according to the law of the State to which the mother belongs at the time of the child's birth; no greater claims can, however, be made than can be made according to German law. Thus, in the case of an English woman who has an illegitimate child, and the father of whom is a German, the English Bastardy Laws work a great injustice; as these laws enable her only to recover from the putative father a sum not exceeding five shillings per week for the maintenance and education of the child, and this only until the child is thirteen years old, unless the justices direct in the order that the payment shall continue until the child is sixteen, and according to the lastly hereinbefore mentioned Article her rights against the German father of her child are determined, not according to German law but according to English law, and, notwithstanding the favourable provisions for the maintenance, education, and bringing up of illegitimate children according to German law, she is deprived of claiming from the German father that which he would be compelled to pay to the mother if she were German, and this owing to the defect in the laws of her own country. Many cases of hardship arise to English mothers by being compelled to accept from the German father less than that which he would have to and should pay if the mother were a German. That the English Bastardy Laws need amendment is beyond question, and it is to be hoped that when

such amendment takes place a provision will be inserted enabling the English mother, in cases where the father is a foreigner, to recover such sum as she would be entitled to recover against him under the laws of that country of which he may be a subject.

HENRY HAPPOLD.

II.—REPORT OF THE COMMISSIONERS OF PRISONS AND THE DIRECTORS OF CONVICT PRISONS FOR THE YEAR 1912–13.[1]

THIS Report begins, as usual, with a statement of the number of prisoners received under sentence during the year. The total number was 166,023 as compared with 175,749 during 1911–12. This, therefore, shows a decrease of 9,726, which is satisfactory as far as it goes. It must, however, be remembered that a decrease in the number of persons received into prisons does not necessarily mean a decrease in the number of convictions for crime. More than 1,600 of this decrease is accounted for by the smaller number of persons imprisoned as debtors or on civil process, as the figures were under this head 13,941 against 15,543. Another cause which has probably operated materially in reducing the numbers of convicted persons sent to prison, is the increased frequency of liberating convicted persons on probation and allowing time for the payment of fines. Both these practices have been for some time strenuously advocated by the Home Office, and, although we have no figures, we think we may safely presume that an increased use of these methods may account for some of the decrease. The number sentenced to penal servitude shows no diminution, but a very slight increase on the figures of the preceding year, as there were 871 against 863. This, of course, is

[1] Parts I & II. London: Wyman & Sons, Ltd. 1913.

purely nominal, and if we compare the figures over a series of years, we find that since 1907–8 the numbers have fallen from 1,173 to 871. If we take a longer series of years the figures are not quite so satisfactory, as we find that in 1901 the numbers were as low as 725. That year has also the lowest figures in the table which the Commissioners have prepared, for both persons sentenced to imprisonment and convicted summarily; these figures being respectively 6,366 and 141,509. The corresponding figures for 1912–13 are 7,910 and 142,183. When, however, the proportion of receptions on conviction is calculated per 100,000 of the population, it will be found to be the lowest "within statistical record," being 413·1, being a still further decrease on the number for the preceding year, 439·2, which was then a record.

As the vast proportion of receptions into prison is of persons committed summarily, it is worth while looking at the figures. Out of 142,088 persons convicted summarily and imprisoned, there were 108,344 males and 33,744 females. Of these 51,808 males and 10,446 females were sentenced to imprisonment without the option of a fine, and 56,435 males and 23,148 females to imprisonment in default of a fine, and 101 males and 150 females in default of sureties. It will appear from this that a much larger proportion of females than males had the option of a fine. This is caused by the less serious nature of the offences committed by females, as the great bulk of their offences may be accounted for by drunkenness 15,537, and prostitution 7,804, out of which numbers no less than 12,866 and 5,409 were imprisoned in default of fine or sureties. About half of the decrease has occurred in the number sentenced for begging and sleeping out, as the total for these offences in 1912–13 was 19,435 as compared with 23,808. Although 700 less prisoners were received for simple larceny, etc., yet, as there was an increase in the number of cases of

this class tried on indictment, the net decrease was only something over 300. The Report gives other decreases as follows: "assaults 750; Poor Law offences 534; breach of police regulations 455; malicious damage 483; gaming 252; frequenting 175; and drunkenness 125." It is remarkable that in the case of an offence like drunkenness, for which (if the Commissioners' term includes drunkenness with aggravations) over 54,000 persons were sent to prison, the difference in the total from that of the year before was only 125. Out of this large number over 48,000 went to prison in default of a fine. The Report also calls attention to slight increases in the number of prisoners received for prostitution, Elementary Education Acts, indecent exposure, cruelty to or neglect of children. Of course this last offence may not be, it is to be hoped, on the increase; but the increase in convictions may be due to increased vigilance on the part of the police and societies. The Governors of some of the prisons comment on the decrease of commitments. The Governor of Durham Prison says, "The daily average population reached the lowest point for several years. Many causes have tended to reduce the number of prisoners. Trade has been exceedingly good in this part of the county; more time than heretofore has been allowed for the payment of fines; many offenders have been placed on probation, and sentences of imprisonment have been growing more and more lenient. It is open to serious doubt if these light sentences are beneficial, either to the offenders or to the community at large." The Governor of Newcastle Prison attributes the decrease to "the beneficent legislation of recent years, together with the industrial prosperity of the district." He does not, however, specify the "beneficent legislation." The Governor of Northallerton Prison adds another possible cause to those referred to above, namely, "the more rigid enforcement of the rules and exaction of tasks of labour, thus making prison life much less comfortable for the habitual idler." He justifies

this suggestion by referring to the considerable decrease in the number of convictions for begging, sleeping out, and kindred offences. The Governor of Exeter Prison attributes the decrease to "the system of giving offenders time to pay fines instead of sending them to prison at once." The Governor of Hereford Prison considers it "the direct result of an unwillingness on the part of the magistracy to commit offenders to prison." He adds, rather doubtfully, "It can only be hoped that the leniency shown may have beneficial results."

After perusing these opinions of experienced men, it is interesting to note what the Commissioners say. After calling attention to the fact "that the number of persons tried in the Courts of summary jurisdiction have decreased during the last ten years by nearly 100,000," they indulge in the hope "that the fall in the number of persons committed to prison during the last two years can be attributed, at least to some degree, to a higher standard of conduct." They attribute the decrease partly to "the growing desire amongst magistrates to exhaust the alternative which the law affords before actual commitment to prison. Thus, in 1911, out of a total number of persons dealt with summarily (684,512), 79,830 were discharged, and 76,584 were dealt with without conviction though the charge was proved. This latter number includes 52,258 cases in which the charge was dismissed, and 12,840 in which recognizances were ordered under sect. 1 of the Probation Act, and 8,868 cases in which probation orders were made under sect. 2." They also refer to the operation of Juvenile Courts under the Children Act 1908.

The Commissioners give a table showing the sentences of prisoners received from ordinary Courts under the various terms of penal servitude and imprisonment, and this shows that the sentences to one month or less were 121,126, or 80·6 per cent. of the whole. They say—"We have, on many

occasions during recent years, called attention to the futility and harmfulness of repeated short sentences, especially in the case of young and trivial offenders. The almost unanimous voice that comes to us from the prisons, be it of officials or voluntary workers, calls for legislative remedy, and it is a great satisfaction to us to be assured that the Secretary of State is giving his grave consideration to this and many other matters touching the administration of justice." They quote the opinions of some of the chaplains, of which that of the Chaplain of Pentonville Prison is, perhaps, the most remarkable. He says:—

"It is pitiful to have to record that many lads continue to be sent to prison for what one must, in all charity, call trivial offences. There were no less than 226 such cases in the course of the past year. The fact points to a strange and serious defect in the administration of the law, that there should be no other way of disposing of young offenders, who are neither vicious nor criminal, but just headstrong, stupid, and foolish. Moreover, the length of sentences is ludicrously inadequate for any purpose other than to accustom the youth to an experience for which he should entertain a lifelong and wholesome dread. From a utilitarian point of view it seems little short of insanity to sit still and make no effort to check this pitiful waste of human life. It seems to me that the man who will invent some salutary method of treatment, not involving imprisonment for minor breaches of the law, will have earned well of his day and generation." We add the testimony of the Governor of Norwich Prison:—"I desire particularly to endorse what the chaplain says in his Report about sending young lads to prison for short sentences—I am certain it does more harm than good. All fear of prison is gone when once they have done their first short sentence, and have found out that it is not so bad as they thought, with the result that they come back again and again."

The Home Secretary has recently announced that a Bill will be brought in to deal with this question. He has not given much information as to the form of the legislation proposed, but has indicated that a power to give facilities for the payment of fines by instalments will be included. How this will operate it is difficult to say; it is hoped it may enable and induce convicted persons to avail themselves more largely of this option of paying a fine, and so escape imprisonment and its contamination, but on the other hand it may diminish the force of a fine as a deterrent if the time of its exaction is postponed. That the effect may not be entirely that hoped for is rather indicated by the evidence of the Governor of Portsmouth Prison, who reports that many of the prisoners who had been allowed time to pay their fine made no effort to do so till assisted, and that "it was evident that the friends had withheld the necessary advance, in the hope that the commitment would not be enforced." We notice that one experienced Chairman of Quarter Sessions has already strongly protested against the proposed measure.

A considerable portion of the Report is concerned with the Borstal treatment of young prisoners, both that of the "full" Borstal System under the statute and the "modified" or local prison system. The figures for the Borstal System for the year are shortly summarised: "1,433 cases have been under detention during the year, viz., 1,275 males and 128 females. Of the males, 670 were at the Borstal Institution at Borstal, 516 at Feltham, and 89 at Canterbury. The commitments were 518 males and 53 females. The average age was 17 years 11 months for males and 17 years nine months for females. The average number of previous convictions in the case of male prisoners was slightly over two, and in the case of females slightly under two. Although the average number of previous *convictions* of inmates was only about two, yet

the criminal history of many showed that they had been previously charged with serious offences for which no order for conviction had been made, the offender being bound over under the Probation Laws; many had also served terms in industrial schools." Of the 7,789 male prisoners between the ages of 16 and 21 received into prison during the year, 518 were sentenced to detention in a Borstal Institution, and 1,679 were treated under the "modified" Borstal System, the great bulk of the remainder having too short sentences to be able to profit from the system. Two suggestions are made as regards sentences to Borstal Institutions; the first is by the Governor of Chelmsford Prison, that "the maximum Borstal sentence might be advantageously raised to five years"; the other is quoted in the Report of the Governor of Gloucester Prison, as being the opinion of the local Borstal Committee, that "should it appear that a boy's character is really bad it should be possible for Courts to send him, on conviction of an offence, to a Borstal Institution, even if he is not tried on indictment." A very strong opinion is expressed by the Governor of Newcastle Prison: "I am strongly of opinion that legislation empowering magistrates to pass on minors, of either sex, convicted of repeated petty offences, a sufficiently long sentence to bring them under the influence of the Borstal System, will be an inestimable advantage. At present young offenders qualify for the Borstal training by months or years of wrong-doing, for which short periods of imprisonment are awarded time and again—sentences which do nothing to correct, but only familiarise young persons with prison life, and thereby destroy its deterrent and corrective influence. Further, this constant coming into prison hardens the material upon which the Borstal reformer has to work, making it less likely to yield to treatment." The difficult material on which the reformer has to work is quite recognised by the Commissioners, who refer to it as follows:

"It is not, perhaps, known that the class of young criminal, who in so many cases has been reclaimed under the Borstal System, is not what the popular imagination considers it to be—'a Borstal boy' of gentle habit and disposition who has lapsed occasionally into criminal acts—but a tough class of hardened young thieves and burglars, who a few years ago would be seen classed with the rest in our great convict prisons." In these circumstances, the result achieved may be considered very satisfactory. The Borstal Association gives figures showing the present position of every lad discharged from Borstal Institutions since their establishment. "Of 634 discharged, unsatisfactory reports have been received in 161 cases only (or 25 per cent.). Of the remainder, 277 are known or believed to be satisfactory; while 188 are reputed to have been lost sight of (no address known), but no report of their re-conviction received."

The Commissioners quote Mr. Councillor C. E. B. Russell, Honorary Secretary of the Shaftesbury Society, Manchester, and who has been recently appointed Chief Inspector of Reformatory and Industrial Schools, as testifying to the complete change which this training seems to have made upon boys committed to Borstal Institutions. "They come back to us on discharge upon licence from Borstal Institutions, well set-up, smart-looking young fellows, evidently having gained what they needed most, *i. e.*, *character*, and only in very rare instances do they fail to settle down and become good workmen." Valuable testimony to the success of the system is also given by the Chaplain of Brixton Prison, who states that only 2 per cent. of the 468 juvenile adults, committed to that prison for trial, have previously served sentences under the Borstal System. A large number of juvenile adults who have not been sentenced to detention in a Borstal Institution are treated under what is known as the "modified" Borstal System. A still larger number are sentenced to too short terms of imprisonment, a month

or less, to enable them to profit by the system. The number treated under this system last year was 1,679. The total number of male prisoners received between the ages of 16 and 21 was 7,789. Of these 4,766 were sentenced to one month or less. An interesting table of their previous convictions shows that "of those sentenced to one month or less, no fewer than 65 per cent. were first offenders, and of those sentenced to over one month 52 per cent." The success of the "modified" Borstal System depends largely on the efforts of the Borstal Committees of the local prisons, and the Commissioners give unstinted praise to the work of these bodies. They say their reports "furnish a very remarkable example of the unwearying and humane effort on the part of the magistrates and other agents, paid and unpaid, an effort which is now organised under the title of the 'Borstal Committee,' in every part of the country where a prison is situate, and whose great and noble purpose is to concentrate care and attention on every young person between the ages of 16 and 21 who is committed to that particular prison. It is not too much to say, that this organisation of Borstal Committees has from its humble beginnings developed into a national institution for the prevention of crime." The success of the Borstal System has induced the Commissioners to try and extend its operation, and they hope that if they can secure the greater accommodation that they require, they may be able to get modified "the terms of the medical certificate which now debars all but the physically fit from profiting from the advantages of the system"; and they desire, if they can, "to make provision whereby young persons not suffering from any grave physical disability may be brought within the scope of the Borstal Act. Another development which the Commissioners are anxious to carry out is the institution of a special mode of treatment of prisoners over the age for

Borstal treatment, but who are "in many cases singularly youthful in habit and demeanour," and who ought not, in their opinion, to be relegated to the adult class without, at least in those cases which offer some chance of amendment, special effort being made, by means of special treatment to divert from criminal courses. An experiment of this nature has been in operation since 1909 at Lancaster Prison. "The object of the experiment was to see what impression could be made on young recidivist offenders by removing them from a large prison, and the ordinary conditions of imprisonment, and placing them in a small prison where they would be kept under close personal observation by a selected Governor." The result of this experiment has been so far satisfactory that the Governor, who died recently, was satisfied that it justified an extension of the class "on condition that discipline and supervision were very strict, the labour exacting, and special means taken for disposal on discharge." The idea that commends itself to the Commissioners in any development of the experiment would be, segregate such prisoners in small parties at selected places under three principal conditions: "(1) strict discipline; (2) means of hard, and strenuous, and profitable labour; (3) means for disposal, on discharge through an active aid society on whose co-operation the Governor and Chaplain could rely in all cases, and close daily *individual* attention by the Governor, Chaplain, and members of the Visiting Committee and Discharged Prisoners' Aid Society." They add, "It is proposed, and for this legislation will be necessary, to bring such cases within sects. 5 and 6 of the Act of 1908, whereby they would be able to earn conditional licence, and to be kept under supervision as in the case of the Borstal inmate." The Commissioners are very anxious to develop their methods for the treatment and reclamation of young females. A great difficulty that arises at present is that the Borstal Act only applies to young women charged with indictable offences, and the great majority of

the offences committed by young women are of a more or less trivial nature. Unless legislative action can be taken, the effect of which would be that a larger number of young women would qualify for the full Borstal System, the Commissioners do not see how they are going to make "a real impression on that army of female prisoners who pass in and out of our local prisons." They allude to "the appalling fact" that "between thirty and forty thousand of all ages pass annually through our prisons, and that of those more than 12,000 have been convicted over six times, and more than 5,000 twenty times."

Compared with this number the work of reclamation must seem painfully small. It is reported that of the 37 discharged on licence from Aylesbury during the year, 24 are considered satisfactory. The reports of those discharged from local prisons are not so good, not more than one out of five being reported to be doing well. Female prisoners between the ages of 16 and 21 to the number of 900 were received during the year. Of these "53 were sentenced to Borstal detention, and 807 were treated under the 'modified' Borstal system in local prisons." A large number of rather older women up to 25 years of age were also treated under the rule, making a total of 2,202. When it is noticed that no less than 1,808 of these were only sentenced to one month and under, the difficulty of doing permanent good to them will be seen at once.

The Commissioners refer with marked approval to the Report of the Young Women's Reformatory at Bedford, U.S.A., and state that they look forward to the establishment of a Women's State Reformatory in this country, to which purpose they think the Institution at Aylesbury might be adapted, and they "see no reason why the Borstal system should not be as effective for the reclamation of the female criminal as it has been proved to be in the case of the male."

We cannot conclude this notice without calling attention to what may be still called the "experiment" of Preventive Detention. The numbers under the system are increasing, as during the year 84 males and one female were sentenced to Preventive Detention, against 63 males and one female the previous year. On 31st March last, there were 127 males and four females actually detained, and 205 males and one female undergoing sentences of penal servitude preparatory to Preventive Detention. This system has hardly had a fair trial yet owing to the existence, at Camp Hill, of a considerable amount of unrest, "culminating in actual insubordination, and which necessitated drastic measures for the re-assertion of discipline." This was due, according to the Governor, "to the fact that many of the men, before arrival here, had somehow become possessed of the idea that at Camp Hill they would have everything they desired and be allowed to act exactly as they pleased." What the prospects of success of this "bold experiment" are, it is too early to judge. Both the Governor and the Roman Catholic Priest comment with satisfaction on the increased smartness of the men, and the former considers it shows "that even men of the class comprised here are not slow to pick up habits which must inevitably lead to greater self-respect: and if we can teach them this, and the habits of steady work and control of the passions, the prospects of many of them on discharge will not be altogether hopeless."

The Chaplain, however, is not hopeful. He compares, in an interesting passage, the description of a determined wrongdoer in a certain class of literature with the actual fact. In the former he is "depicted as clever, forceful, courageous and intellectually keen"; but in fact he is "as one of a class mentally degenerate, physically imbecile, and ethically moribund." In another place he says, "Self-restraint or continued application to work of any kind is an impossibility."

Of course, this is only speaking of the majority; but we are afraid that he considers that the majority is a large one. He sums up: "From a purely mundane point of view, the outlook for these prisoners on discharge is extremely disheartening. There are some few of whom one may expect better things; of the majority, nothing more can be looked for than that they will return to their normal mode of life."

The Commissioners call special attention to the fact that all these three officers comment on the undesirability of sentencing young men to Preventive Detention before the effect of a sentence of penal servitude has been tried. The Roman Catholic Priest goes so far as suggesting that no man shall be sentenced to detention "who has not reached 40 years of age, and has been in penal servitude three times." The Commissioners do not go so far as that, but think "that it should be regarded as a fundamental principle that a sentence of penal servitude should be given its full scope of potential deterrence before a practically young man is sent to Camp Hill as an habitual criminal." Attention is called to and high praise bestowed on the valuable work rendered by the many voluntary associations, such as the Church Army, the Salvation Army, the Association for the Aid of Discharged Convicts, who labour on behalf of prisoners, and reference is made to the very valuable work carried on by the Lady Visitors of Prisons. There is much else we should like to call attention to in this admirable Report, but our space does not permit it.

III.—IMPRISONMENT FOR DEBT.[1]

IT is more than four years ago since the report of the Parliamentary Committee on the Law of Imprisonment for Debt was discussed in the pages of the *Law Magazine*

[1] *County Courts (Plaints and Sittings).* Ordered by the House of Commons to be printed, 8th August, 1913. London: Eyre & Spottiswoode.

and Review. The law on the subject has since then remained unchanged, though not one of the fifteen Members of the Committee desired to retain it without material alteration. It is, however, perhaps in consequence of that report, and the discussions on the subject which followed it, that the practice has undergone a considerable change—the kind of imprisonments for debt to which the Committee chiefly devoted its attention having been reduced by nearly one-half during the interval. I refer to imprisonment for debt under the judgment-summons procedure in the County Courts, which Mr. Pickersgill and his five supporters on the Committee proposed to abolish, but Mr. Rendall and his five followers desired to continue under certain restrictions. Had the figures as regards judgment-summonses stood as low in 1909 as at present, the Committee would hardly have passed so lightly over the other important branches of imprisonment for debt, or ascertained so little with regard to the systems of imprisonment for debt in force in Scotland and Ireland. Now, however, the Home Secretary has promised to take up the subject; and it is to be hoped that the delay will lead to the passing of a comprehensive Bill dealing with all kinds of imprisonment for debt—under whatever terms disguised—that are allowed by the existing law, even though in order to effect this object its scope should be wider than that of the Debtors Act of 1869. And the Home Secretary's recent utterance encourages this hope, for he expressly dealt with the subject of fines with the alternative of imprisonment, in which case the imprisonment is not usually described as for debt. Still the distinction between a fine enforced by imprisonment for non-payment of the fine, and imprisonment imposed as an alternative to the payment of a fine, is a very narrow one, and in fact the slight difference between them renders the latter more beneficial to the debtor, viz., that when the term of imprisonment is served the fine is gone.

The entire subject of fines as punishments requires careful consideration. As long as we use both fines and imprisonments as punishments some relation must be observed between them. This man cannot pay a fine. What imprisonment should he have then? This man's health renders imprisonment highly objectionable in his case. What sum, then, should he pay? And when this equivalence was once considered and supposed to be ascertained, it was natural to extend the scale to cases in which the prisoner was capable both of paying the fine and of undergoing the imprisonment, and thus to pass the alternative sentence. This has now become the usual sentence for almost all trivial offences, and the offenders committed to prison as the alternative to payment of a fine are more numerous than all other prisoners for debt put together—the fines being usually very small and the alternative imprisonments very short. The objection to this, in the first place, is that it is a class punishment. A rich man can pay without inconvenience a sum which the poor man can only raise by great efforts or perhaps not at all. Two men are guilty of the same offence. One escapes by paying a sum which is to him a very trifling one. The other has to go to prison and serve out his sentence there—merely because he is poor while his compeer is rich. It used to be thought that imprisonment was a great disgrace, and also that prisons were hot-beds of crime from which a man always emerged worse than he entered. Imprisonment is a very serious injury to a working man when such beliefs as these prevail. But we have now, it is alleged, a different state of things to deal with. Prisons are meant to be places of reform, and men will in future, we are told, be better when they leave than when they entered. But the reformers meet us with a new objection. The sentences passed in lieu of fines are too short to enable the persons to derive any benefit from the reforming agencies of the prison. The

new-comers only disturb the prisoners who are being trained there. Are we, then, to pass long sentences for trivial offences—offences which, moreover, we will still allow the rich prisoner to expiate by payment of what to him will be a very trivial fine?

Of course—as the Home Secretary noticed—in this class of cases every facility should be given to the offender to pay the fine before locking him up in prison. A reasonable time should be allowed to procure the requisite sum—instalments perhaps being accepted—and money payments on account of the fine should procure a proportionate reduction in the alternative imprisonment. And similar facilities ought, I think, to be given to persons liable to imprisonment in default of punctual payment of sums of money other than those levied as fines. The prisoner's labour in prison never, I believe, suffices to pay for the full cost of his maintenance, so that his imprisonment at the public expense is always a losing game for the public, whereas payment of a fine is a gain to the public however small the fine may be. But I venture to go beyond this, and recommend that no imprisonment should take place for non-payment of a very small sum of money, whether payable as a fine, as a debt, or otherwise. The fines and sentences might be left to accumulate, without any actual imprisonment, until a certain figure was reached, when the prisoner, if unable to pay the accumulated fines, could be sent to prison for a term long enough to enable him to profit by the reformative methods which were practised there. A similar course might be advantageously adopted in other cases where there are very small periodical payments to be made, and committals for very short terms contemplated. Even where the payment is for the benefit, not of the public but of a private litigant, it is, no doubt, an advantage to him to obtain his money, but it is of no advantage to him to render his debtor uncomfortable, which is the only result of unsuccessful

imprisonment. And it is never the duty of the State to facilitate one citizen in revenging himself on another citizen—at all events, when the latter citizen has committed no offence against the State.

Reverting to Imprisonment for Debt in its more strict meaning, the law in England is defined by the Debtors Act of 1869, which does not abolish imprisonment for debt altogether—as has been so persistently asserted—but abolishes it subject to six clearly-defined exceptions, stated as such in the Statute itself. The Irish Act of 1872 is in the same terms, and yet not of precisely the same import; for in preserving imprisonment under the summary jurisdiction of the Magistrates at Petty Sessions, a jurisdiction with regard to rates is preserved in England, where it previously existed, but not in Ireland, where it did not exist before. The Scottish Debtors Act of 1880 contains two exceptions, not six, viz., (1) Rates and Taxes; and (2) Orders for Alimony or Maintenance. Thus it excludes altogether imprisonment under the Judgment-Summons System, to which the inquiry before the Parliamentary Committee was to a great extent confined. The judgment-creditor in Scotland has no means of procuring the imprisonment of his debtor in order to compel the latter to pay the debt, or to punish him for non-payment of it. His course is a different one. When, as usually happens, the debtor is an employé, the creditor can obtain an order to arrest his wages in the hands of the employer in order to satisfy the debt. (There are, of course, provisions for preventing this arrest of wages from working injustice to other creditors and for the maintenance of the debtor, which I need not state in detail.) The Committee considered the question of extending this Arrest of Wages to England and abolishing the judgment-summons in consequence, but they did not recommend the change. Since their report, however, the Government has extended this

principle of Arrest of Wages to England in the Insurance Act, and though this Act has given rise to a good deal of discontent, I am not aware that it is likely to be repealed in consequence. If so, why not extend the same principle to judgment-debts and thus save 5,000 or 6,000 debtors (the number was twice as large a few years ago) from imprisonment every year? The County Courts in England were responsible for 5,820 imprisonments under the judgment-summons process in 1912.

Indeed, the way in which these judgment-debts are often collected approaches pretty closely to an Arrest of Wages. It might perhaps be called *Stoppage in Transitu of Wages*. The plan is this. The judgment-debtor is a working man. The time and place where he will receive his wages is known to the bailiff. Armed with his arrest-warrant, the bailiff catches the debtor with his week's wages in his pocket, and however much that week's wages may be wanted for other purposes—it must be paid over, or else the debtor must go to prison and earn no wages for the next week, and, probably, for a longer period. The last Annual Return sets out in a distinct column the number of debtors who paid (or settled) after arrest, but before imprisonment. They are five or six times as numerous as those who went to prison; but in some districts the proportion is much greater than this. In Circuit No. 5—consisting of some large manufacturing towns in Lancashire—2,310 debtors were arrested, of whom 2,271 paid or settled without going to prison, while 39 only were imprisoned, of whom 6 were released without serving the full sentence which the remaining 33 served. It can hardly be doubted that the 2,271 either paid the debt in full out of their week's wages or were let go after handing over the whole of the wages to the captor. Circuit No. 17, which tops the list of actual imprisonments for the last year with 458 imprisoned debtors, had but 1,746 arrests

to No. 5's 2,310. The chief town in Circuit No. 17 is Great Grimsby, and it is apparently not so easy to catch a sailor with money in his pocket as a miner or a factory-hand. The present Return also informs us, under separate heads, the number of persons committed to prison but released without serving their full sentences, and the number who served their sentences in full. It may surprise some of our readers to learn that a large majority of the debtors who actually enter a prison serve out their full sentences. There are, however, strong contrasts between particular places. As a rule, the greater the number of committals (to prison), the larger is the percentage of those who serve out their sentences. In the Birmingham Circuit, out of 59 persons committed to prison, 44 were released without serving their full sentences, which were only served by 15. With a different judge a few years ago, there were 700 imprisonments instead of 59. In Circuit No. 17 already referred to, there were only 36 releases before the expiration of the full term, which was served out by 422 debtors. The majority of the imprisoned men appear in the former instance to have been able to pay their debts, but required a little time to make up the amount, while in the latter there is reason to apprehend that the judge's findings as to means to pay were erroneous in some hundreds of cases. Liverpool and Manchester both stand low as regards the number of imprisonments and the number of sentences served out, but it is somewhat curious to find more imprisonments in Birkenhead than in Liverpool, and more imprisonments in Salford than in Manchester. Imprisonments are numerous in Leeds, but the majority of the debtors appear to have been released without serving out their full time. We find everywhere a mass of anomalies which it seems vain to attempt to reduce to order. Five Circuits out of 54 comprised in the table are collectively responsible for more than one-third of the total number of

these imprisonments. But why not, instead of analysing these anomalies in detail, clear out the entire lot by a single sweep of the brush? The time has, I think, come for this, and in Scotland the sweep would be a very small one. There is no doubt that if all the Members of the Parliamentary Committee had been present at its last meeting, the report would have condemned the 6th Exception in the Debtors Act 1869.

There is a growing opinion, which becomes stronger every year, that our prisons ought to be public institutions erected and maintained by public money for the public good, and over which the public should at every stage possess absolute control. Why should we permit them to be used by private persons for the purpose of exacting payment of private debts to themselves, often to the detriment of other persons who are equally meritorious? It is admitted on all hands that the money paid to ransom the body of the debtor from the public prison in which he is confined does not always come from the debtor himself. He has a father, a brother, a son, or some other relative who will pay the money rather than allow his relative to serve out his sentence. How is the country benefited by the transfer of money thus effected? It is desirable to discountenance this kind of credit—which often approaches perilously near blackmail—but we pat the usurer on the back while he extracts from the father or the wife the amount of a loan which, to the usurer's knowledge, was made altogether contrary to the wishes of those who have now to supply the requisite funds for the prisoner's ransom.

There are so many forms of imprisonment for debt still in use that it would be difficult to assign any common characteristic to all of them, except that they consist of detention with seclusion and forced labour in a public prison —terminable on payment of a sum of money. One distinction, however, is relied on by many persons as of great

importance, though in practice I fear but little weight can be attached to it—that between cases in which proof of the debtor's ability to pay the debt must be given before he can be imprisoned, and those in which such proof is dispensed with. Thus ordinary shop-debts are usually sued for under the judgment-summons process, and proof of ability to pay must therefore be given before obtaining a committal order, whereas no proof of ability to pay rates is necessary before imprisoning the defaulting ratepayer, it being sufficient under the Statute to show that he has no goods which can be distrained. This absence of distrainable goods suggests inability rather than ability to pay. Imprisonment for Debt—a phrase more remarkable for its conciseness than its definiteness—may be considered from two points of view, first as a punishment inflicted for a past default in payment of a debt which the debtor was bound to pay; and, secondly, as a mode of compelling him to pay a debt which he is now bound to pay, but will not pay without compulsion. On the former of these views imprisonment for debt becomes a branch of the Criminal law—the non-payment of the debt at the proper time being an offence which ought to be punished in the interest of the public. The debtor should, of course, have in this case all the same advantages as regards defence, appeal, remission by the Royal Prerogative, etc., as if convicted of any other offence, while a mere offer to pay the money that ought to have been paid long before ought not in all cases to expiate the offence. Inability to pay at any past time would, however, be in all instances a sufficient defence. The law ought not to require a man to do what he cannot do, and it is only plunging deeper in the mire when it punishes him for not doing what was impossible. There may be indeed a crime in connection with the debt in the payment of which default has been made. But the fault is here in the inception of the debt, not in

the non-payment of it. The debtor obtains credit by false representations, and thus binds himself to pay what he never had any reasonable expectation of being able to pay. The punishment for all such offences is, however, entirely a matter for the public, whose rule should be to adopt the course which is most for the public good; and there is no ground whatever for adopting a hard and fast rule that payment in full of debt and costs, when made, should in all cases be deemed sufficient punishment. But I think no rational man defends the present law on the ground that it affords a satisfactory mode of trying and sentencing a debtor for a past offence and of carrying out the sentence thus passed on him. If imprisonment for debt is to be maintained at all, it must be by reference to the future, not the past—not as a punishment for not doing what a man ought to have done, but a means of compelling him to do what he is now bound to do. But when we look at the matter from this point of view, is it not plain that all imprisonments without previous inquiry as to the man's ability to pay are wrong on principle? Why should we imprison anyone for not doing what he could not do? And we run the risk of doing this whenever we imprison a debtor without previous inquiry as to his means to pay. Then what is the use of this imprisonment? It does not enable the man to pay. It has rather the contrary effect. Its direct and legitimate result in procuring payment is simply *nil*. And of all human desires, that which it is most objectionable to encourage is the desire of inflicting pain, loss, injury or discomfort on anyone who has injured others out of mere revenge and without hoping to obtain any benefit, personal or otherwise, from the infliction. Imprisonment of a debtor in order to gratify the malice or spite of a creditor, who knows that neither he nor the public will gain anything by it, is about the most indefensible practice that ever

gained a footing in a civilised community. But the creditor usually has other objects in view in keeping an insolvent debtor in prison, although well aware of his insolvency. If a brigand claims £18,000 for the release of his captive, it does not follow that he believes that the captive possesses property of that value or could raise that sum if set free. It is that he expects that some wealthy relative or friend of the captive, or some person otherwise interested in his fate, will come forward and pay the necessary ransom. The law at one time, by rendering the capture legal, enabled the creditor to hold his debtor to ransom, but by subsequent amendments the creditor was in most cases required to prove that the debtor had means to pay before it empowered the creditor to seize him and lock him up in a public prison at the public expense; and the period of detention where ability to pay had been proved was also limited. Yet the evil still exists. Committal orders are obtained against men who are absolutely penniless, and a ransom of equal amount with the debt and costs is still obtained from some wealthy or prominent friend, or relative of the debtor who never owed the creditor a farthing and did his utmost to prevent the debt from being incurred. Mr. A. senior has done all in his power to render his spendthrift son a law-abiding and useful citizen, and has repeatedly helped him out of a scrape. But he declares that he will go no further. Mr. A. junior goes to a money-lender of the worst type and incurs a debt not one-fifth part of which represents a genuine advance. The County Court judge either connives at what takes place or is hoodwinked by the money-lender's representative, and Mr. A. junior has to pay the debt and costs or go to prison for six weeks. The old man does not wish to have his son, bad as he is, sent to prison, to say nothing of society's possible criticisms on his own conduct. So the father opens his purse and the money-lender receives the money.

How is the public benefited? Is it not rather injured by encouraging an objectionable kind of credit?

I have noticed that in the great majority of cases the debtor, when once lodged in prison, serves out his full period of detention, while, on the other hand, the great majority of those who are arrested pay the money and are not imprisoned at all. These results related to the judgment-summons process only. I have not sufficient data to say whether they are equally applicable to other processes. But they seem to me to go far to show that, when the man can pay, he pays, and that when he serves out his full term of imprisonment, we may infer that he cannot pay. If so, we are still imprisoning 4,000 persons annually who have been found by the judges of the County Courts to be able to pay their debts when they were really unable to do so; and 4,000 erroneous findings followed by 4,000 erroneous imprisonments in each year are rather startling. But the moment we look a little below the surface we are struck by the difficulties of the situation. In order to obtain a committal order, a judgment-creditor must prove that the debtor had the means to pay the judgment-debt since the judgment was entered up, and that he did not pay it. But what is meant by "means to pay" a debt? If the judgment is for £5 and it is proved that, subsequent to its being entered up, the debtor was paid a month's wages amounting to £6, is it proved that he had the means to pay this judgment-debt since the judgment was entered up, notwithstanding that he may have had other pressing debts to the amount of £6 and upwards? The majority of County Courts apparently adopt some such rule as the following:—The first claim on a man's earnings is for the support of himself and his family. This comes before payment of the judgment-debt. The question whether he had the means of paying the judgment-debt since the judgment was entered up, therefore, assumes the

form: Could he have saved that sum out of his earnings since that date? But, what if he has several judgment-debts to meet (a case was mentioned before the Committee in which the debtor was arrested on seven arrest-warrants each relating to a different judgment)? Or, suppose he has debts otherwise of a pressing character, *e.g.*, under maintenance orders, affiliation orders, orders to contribute to maintenance of child at an industrial school or reformatory, debts due for rent or taxes leviable by distress or under hire-purchase agreements, bills of sale, &c., in almost endless variety? The assumption that all earnings other than what were required for the maintenance of the debtor and his family ought to be considered means for the payment of the particular judgment-debt that happens to be before the Court, is, I think, wholly unjustifiable: and without this assumption, how is proof to be given, under ordinary circumstances, of means to pay? It is dishonest to have enough money to pay all one's debts and to leave some of them unpaid: but if a man has enough money to pay some but not all, how can it be urged that it was dishonest of him not to pay Mr. A. in full when the consequence of doing so would have been to leave Mr. B. unpaid? The practical question for a debtor who has several creditors, and can pay some but not all, is, "which of these men will give me most trouble and annoyance if I don't pay him?" And if some of these creditors have got committal orders while others have not, his reasoning will probably be of this kind: "I must pay A., or he will imprison me. But B. cannot run me in for some time to come. He must wait accordingly." The committal order thus makes the creditor who obtains it a secured creditor—a man who deems himself entitled to payment in priority to others. The debtor, for instance, tries to effect a composition with his creditors. He can pay them ten shillings in the pound all round, and offers it. But two of them have got

committal orders. "No composition, and no compromise for us," they say, "Pay, or go to prison," and he has to pay these creditors in full accordingly, unless he has cash enough to institute bankruptcy proceedings in which the composition can be offered and accepted.

The one-sidedness of the system as regards rich and poor here comes in very prominently, though the terms "rich" and "poor" are not used in quite the usual senses. The man who can always escape imprisonment for debt is the man who can command a certain amount of assets, though these may not exceed the one-hundredth part of his liabilities. He can always cause himself to be adjudicated bankrupt, and then, even if already arrested for debt, he is entitled to his liberty as a matter of right. His bankruptcy has vested all his assets in the Official Receiver, and he could not pay a shilling of it to the arresting creditor even if he wished to do so. An Administration Order under the Bankruptcy Act of 1883 somewhat enlarges the rights of English debtors in this respect, but a debtor under such an order is by no means as favourably situated as a bankrupt, and in many cases the assetless debtor has not even this resource open to him. What reasonable objection can there be—as long as we persist in imprisonment for debt at all—in permitting a debtor to say: "I am willing to give up everything that I possess for the benefit of my creditors generally, and to permit the Court to impose such conditions as it chooses on my future earnings. All I ask in return is that I am not to be sent to prison unless some criminal offence can be proved against me. I have no money except what I state in my affidavit, and if my affidavit is false, let me be imprisoned for perjury. I never had a fair trial on the charge of not having paid what I could have paid, and ought to have paid; but you can go into the whole matter in my bankruptcy, and punish me if I am guilty of having done so." Under the old

laws for the relief of insolvent debtors this could to a great extent be done, but these old laws were repealed by the English Statute of 1869 and the Irish Statute of 1872. Everyone seems to have jumped to the conclusion that no provision for the relief of insolvent debtors would be needed for the future. Imprisonment for debt was abolished (with six exceptions to the abolition staring us in the face). Non-traders could for the future avail themselves of the Bankruptcy Laws as well as traders, and need not therefore go to prison in any case where the bankrupts could escape that fate (but the insolvent debtor might be quite unable to raise the necessary fees to enable him to take advantage of the Bankruptcy Laws), and whenever the insolvent debtor went to prison in future an order of the Court would be disobeyed, and his imprisonment might be described as imprisonment for contempt of the Court which had ordered him to pay what he could not possibly pay. But a provision that an order of the Court must be disobeyed before a man can be imprisoned is a different thing from a provision that a man can only be imprisoned for disobeying an order of the Court. I do not think there is any Statute which binds a judge to sentence a man to be imprisoned whenever he disobeys an order to pay money. The punishment for contempt is always in the discretion of the judge.

I have hitherto written as if the law required clear and cogent evidence of ability to pay to be given before sentencing the debtor to imprisonment for non-payment, just as we would require clear and cogent evidence of his having committed any other offence before sending him to prison for that offence. But there is a passage in the Debtors Act that has frequently received a different construction, and perhaps rightly. Proof of means to pay under the Debtors Act 1869 "may be given in such manner as the Court thinks just"—which is supposed to release the judge from the rules

of evidence altogether, and authorise him to listen to any kind of hearsay or inferential argument—such as that the accused wore a black coat worth at least £5, when, perhaps, the price of that coat is included in another judgment-summons at present before the same judge. The judge may decide on any kind of evidence, or, it would seem, on no evidence at all, for though the Debtors Act seems plainly to require the plaintiff to prove the defendant's ability to pay, the form of summons issued requires the defendant to show cause why he should *not* be committed to prison. The results of such a system need hardly surprise us. In 1912, 240,228 judgment-summonses were actually heard, and a decision given in each case, as to whether the debtor had or had not sufficient means to pay the debt in question. The total number of days on which County Court judges sat, when added, came to 10,363, so that it will be seen the average number of findings as to means to pay arrived at by each judge for each day on which he sat was 23. But, considering the other business before the Courts, the time given to each judgment-summons must have been much less than this proportion of the whole time that the Court sat: and six week's imprisonment for a British subject not accused of any crime may have turned on each of these decisions. Even if such trials were fenced round by the strictest rules of evidence, they would be unsatisfactory: but what if the evidence were of such a nature that supposing non-payment of a judgment-debt by a debtor, who had the means of paying it, were made a crime triable by a jury, not one syllable of it could be laid before that jury? It is not surprising that so many experienced County Court judges are protesting against the impossible task which the present law imposes on them. The law requires them to make bricks, and refuses to supply them with straw. Some of the judges, I may add, seem to think that their function is to collect debts, rather than to hold the scales of justice evenly

between debtor and creditor, and they consequently have a bias in favour of the decision which is most likely to collect the debt. When the judge is required to order a particular mode of collecting a debt on fulfilment of certain conditions, he is of course bound to make the order when these conditions are complied with, but I think, if he regards this process as an objectionable one, and finds that the objections are not sufficiently known to his employers, the public, he is merely doing his duty to the public by bringing the faults of the present system before them. If the men who from the very nature of their duties are most competent to detect the errors in our present laws, and point them out to the public, are to be silenced for official reasons, how is the public ever to learn the truth? And even where something cannot be satisfactorily done under the existing system, it still may be possible to do it much better than at present.

The provision which protected the debtor, who was unable to pay, from imprisonment for non-payment has been to a great extent rendered inefficacious by the prevalence of the practice of making small instalment orders. However small a man's means may be, a plausible case may be made as to his ability to pay an instalment proportionally reduced. But, strange to say, while the Debtors Act 1869 requires proof of means to pay before a committal order can be granted, there is no similar provision as regards instalment orders, and a man whose wages are £2 a week may be ordered to pay £2 : 10s. a week in instalments to creditors without proof of ability to pay a penny piece. A more usual course, however, appears to be this. The judge finds, on very unsatisfactory evidence (of which, probably, no copy is preserved), that the debtor could have paid the plaintiff's judgment-debt after the judgment was entered up, and he grants a committal order for, say, six weeks, expressed to be in punishment for this offence. But he goes on to stay the execution of this committal order as long as the debtor pays the instalments

—which he then lays down—and it is regarding these instalments that the discussion takes place. Most frequently all goes right. The instalments are paid and the committal order is never enforced. But suppose, owing to illness or a strike or some similar cause, the debtor is no longer able to pay the instalments. The committal order for the original sum now comes into force, and unless the debtor has taken time by the forelock and procured a variation of the instalment order, he is arrested and carried off to prison for non-payment of the original debt. This proceeding seems to me wholly inconsistent with the spirit and meaning of the Debtors Act, under which the case of *Stonor* v. *Fowle* played a part similar to that of *Taltarum's Case* in our earlier legal history. Deciding that the Court could not make an instalment order which directed the debtor to be imprisoned on failing to pay any future instalment, it allowed this very thing to be practically done by a side-wind. A committal order made on insufficient evidence, but never intended to be enforced, ran concurrently with the instalment order, and was brought into being on failure to pay an instalment.

In advocating the complete abolition of imprisonment for debt, I do not propose to alter the law relating to contempt of Court, but, of course, that law must not be amended so as to re-introduce imprisonment for debt by a side-wind. Thus, if it were enacted that any judgment-creditor might, on proof of the judgment-debtor's ability to pay the debt, obtain an order on him to pay it; and that in the event of this order being disobeyed, the judge should commit the debtor to prison for contempt of Court in disobeying it, it is evident that we should be merely setting up the old system under a new name—a name already given to it by many persons, though the Statute affords no ground for the alteration. Imprisonment for non-payment of a sum of money ascertained by an order of the Court, and imprisonment for non-compliance with

an order of the Court to pay a sum of money, are two ways of designating the same thing. Let us keep our prisons for offenders (or accused persons) in cases where the public interest is involved; and giving all reasonable facilities to a man's creditors to lay hold of his assets, let us protect his person, and allow him his liberty where there is no crime and no criminal charge against him.

I have pointed out that bankruptcy puts an end to imprisonment for debt under the Debtors Act of 1869. For the debtor's estate then passes to the Trustee or Official Receiver, and is distributed in accordance with the Bankruptcy Law. This distribution will usually be altogether different from that which takes place under the judgment-summons process. That process, I remarked, practically gives priority to judgment debts, while in bankruptcy a different class of debts are thus preferred. We always proceed under the Debtors Act as if no other debt than that of the judgment-creditor existed, and therefore no question of priority could arise. But, as a matter of fact, the judgment-debtor usually has other debts, and is not able to meet all his debts as they become due. He is an insolvent debtor, and the best distribution of his estate would be that adopted in insolvency or bankruptcy, in which the judgment-creditor loses his priority altogether. Yet this creditor may at present often obtain payment of his debt in full by means of a committal order even after the debtor has committed an act of bankruptcy, provided that no receiving order has been made. We want better provisions for laying hold of and distributing debtors' estates while letting their persons alone, and it would be very desirable to have the same rules applied to the distribution of insolvent estates in all parts of the Kingdom, instead of giving, for example, Crown debts more priority in Ireland than in England. At all events, compelling debtors to make payments to

their judgment-creditors through the County Courts is a very objectionable mode of distributing insolvent estates, yet it often has that effect.

I am aware that some very able and painstaking judges, who have done much to remove the opprobrium which imprisonment for debt has brought on the County Courts, are opposed to its total abolition. That, with a sufficiently large and able staff of competent and hardworking judges, few cases of real hardship could arise under the present law I admit. But besides delaying the disentangling of our civil and criminal proceedings, and the assertion of the right of the public to have all its prisons used in its interest and under its authority, would such a system as I have mentioned repay the labour expended on it? The County Courts in which wrongful committals for debt are fewest, and in which the judges have made the greatest efforts to avoid mistakes, are probably those which are least popular with the most litigious class of creditors, and they will not be found to attract more business or larger fees than those in which it is easier to get a debtor "run in" and kept in at the public expense in the hope of somebody coming forward to pay the ransom. That the imprisoned debtor may deserve his fate, even where he never could have paid the debt, I also admit. He ought not to have incurred it, and probably knew when doing so that the chance of paying it was very remote. But our object is not to punish every man who deserves it: while if we should ever undertake that task, it should be done by an extension of the Criminal law in which the payment of debts would occupy a very secondary position. The powers of the County Court judges over the debtor's property, however, might well be extended at the same time that their power over his body was restricted. Is there not something absurd in arresting a man and sending him to prison for non-payment of £2 when he has that sum in his pocket, and the judge, who can keep

him under lock and key for six weeks, cannot take it from him? Is there not a real, instead of a technical, contempt of Court in saying: "I will keep my money in my pocket, and serve out my sentence"?

In conclusion, I may remark that the argument in favour of imprisonment for debt, that it enables the working man to obtain credit when owing to illness or accident he is unable to earn anything, is greatly weakened by the Insurance Act. Labourers' Unions too often assist their members on such occasions, and credit given only on account of the present law of imprisonment for debt is not likely to be given on very favourable terms for the debtor.

LEX.

IV.—SIR WILLIAM FOLLETT.

SIR CHARLES RUSSELL, lecturing on one occasion in the Middle Temple Hall, and speaking of former Attorney-Generals, said that Sir William Follett was the most brilliant of his predecessors. This may appear to have been excessive praise, but a student of Follett's career will probably not think so. "In every qualification of intellect and grace of manner," said Lord Hatherley, "he was as nearly perfect as man can be." He left behind him a most remarkable reputation, and, if he had lived, would certainly have reached any honour in his profession to which he cared to aspire. His character was sketched in essays by Lord Brougham and Samuel Warren, and each essay is little more than an *elogè*. When he was cut down in the full tide of success, his tragic fate aroused the greatest sympathy and regret.

Follett was born in 1798 in Devonshire, where his father, who had been an officer in the army, carried on business as a timber merchant. He was educated at Exeter Grammar

School and at Trinity College, Cambridge. In 1821 he became a special pleader, and in 1824 he was called to the Bar and joined the Western Circuit. He entered upon his profession with every qualification for complete success. His mind had been wholly given to jurisprudence, and was filled with the solid fruits of many years' study. His understanding was naturally penetrating and acute, and he possessed extraordinary quickness of perception. Accompanying these characteristics was a sound and mature judgment, which was never at fault. Lord Brougham states that, on the first occasion that he addressed the Court of King's Bench, every one was struck with the excellence of his argument, both in matter and manner. His confidence was firm and unhesitating, but free from presumption. The judges decided against his contention, and he was heard to say in an audible whisper, "They are going to decide quite wrong—as wrong as it is possible for men to decide." This remark is said to have made as great an impression on those who overheard it as the able argument which he had just delivered. Indeed, Follett is stated to have been almost as fully fitted for his professional duties at his first appearance as ever he was. Lord Brougham compares his premature maturity to that of the younger Pitt, who placed himself on a level with the most experienced statesmen from his first entry on the stage of public life.

The progress of Follett at the Bar is said to have been somewhat slow at first. There is a story that either he had applied for, or would have been willing to take, the position of a police magistrate soon after he was called. This mood cannot, however, have lasted long, for he soon went steadily ahead. His first reported case was *Moore* v. *Stockwell* (6 B. & C., p. 76), in which a point with regard to the law of bail was argued, and Follett's contention upheld. As soon as he had settled in London, he had formed a connexion with John Wilson Croker, the eminent Tory

politician and writer. "He was domesticated in a great measure in my house," says Croker. "When he began to study the law, I made him a present of my law books, of which I had a tolerable collection." This connexion must have been of considerable assistance to the young barrister, for Croker was a man of great influence and power. In 1830 Follett married a ward of Croker, Miss Giffard, the eldest daughter of Sir Hardinge Giffard, Chief Justice of Ceylon, and a first cousin of the present Earl of Halsbury.

As an advocate Follett has probably never been surpassed for all-round excellence. His manners were fascinating, and his bearing was graceful and dignified. He was never rude, or discourteous, or vulgar, or coarse, and he was always good-natured and considerate towards his juniors and inferiors. He was very tenacious of his own opinion. He would persevere in his efforts to win over hostile judges and juries to an extent never exceeded, and yet he did it so blandly and unassumingly that he never irritated or provoked any one. His equanimity and self-possession were never disturbed, and he always retained the fullest command of his extraordinary faculties in every emergency, however unexpected or embarrassing. He never lost his temper or allowed any impetuosity or irritability of his opponent to provoke him to retaliate. He was a ready and dexterous logician, with an extraordinary power of rapidly seizing the essential points of a case and discarding the irrelevant. He had an extremely tenacious memory and a remarkable power of drawing distinctions and discovering analogies. His attention was always wide awake, and his whole soul was concentrated in each case and in each successive step of it. His circumspection was perfect, and he was never to be taken off his guard, nor ever hurried into any hazardous proceeding. If his antagonist was not always on the watch, that antagonist ran the most serious

risks. Follett was, as Grattan once said of Lord Clare, though in another sense, "a dangerous man to run away from."

Follett never allowed any point in his client's favour to escape his rapid perception and lynx-eyed vigilance. "Perhaps no man," says Warren, "ever defeated a greater number of important cases by unexpected objections of the extremest technical character." He was an expert cross-examiner, as one might gather from a remark of Serjeant Ballantyne. "Follett," says Ballantyne, "asked the fewest questions of any counsel I ever knew." No man, perhaps, took so few notes on his brief during a cause; but John William Smith, of *Smith's Leading Cases*, told Warren that this was not always so, for, when he first came to the Bar, he took most full and elaborate notes of every case, and prepared his arguments with extreme care. As a speaker his utterances were characterised, not by rhetoric or fire, but by lucidity, dexterity, and persuasiveness. "His voice," says Warren, "was low and mellow, insinuating its faintest accents into the ear, and filling it with gentle harmony. His utterance was very distinct, and he had the art of varying his tones so as to sustain the attention of his auditors for almost any length of time."

Follett was a Tory in politics. It was said of him in after life, as it was said of Canning, and Lyndhurst, and Disraeli, that he had commenced as a reformer, but Croker says that, from the time of his settlement in London, his political views were Tory. In 1835 he was appointed Solicitor-General in Sir Robert Peel's administration, and was returned to Parliament as member for Exeter. His tenure of office was short, but in 1841 he again became Solicitor-General on Peel's second accession to power. In 1844 he became Attorney-General in succession to Sir Frederick Pollock, who was appointed Lord Chief Baron. In Parliament Follett was a complete success. He proved

himself an accomplished debater, and his Party came to rely on him with unbounded confidence in every emergency. His command over his audience was not confirmed by any wit that sparkled in his speech, or by lively imagination, or by impassioned or pathetic appeals, or even by any great power of vehement declamation. It was derived from a rare combination of most lucid statement, singular aptness of argument, and homely illustration, mingled with a very sparing but not unhappy use of sarcasm. Follett was not, however, a well-read man, although he was an effective speaker. He was a lawyer and a lawyer only. Brougham states that he was moderately provided with political knowledge, and that his general information was not extensive. He disappointed those who expected from his conversation the same pleasure that they derived from his public exhibitions. Brougham says, however, that he was well-versed in classical literature, and retained to the last his relish for its study.

Follett was counsel in a number of interesting cases during his career at the Bar. He appeared for the plaintiff in the famous case of *Norton* v. *Lord Melbourne*. The plaintiff was the Honourable George Norton, husband of Mrs. Norton, who was a grand-daughter of Sheridan, and was well known in her day as a novelist. The defendant was Lord Melbourne, who, as Home Secretary, had appointed Norton to a stipendiary magistracy, and rendered him other acts of kindness. Norton, a man of despicable character, had been on bad terms with his wife for some time, and had subjected her to much ill-usage. At last, in 1836, he brought an action against Lord Melbourne, in which he claimed £10,000 damages as compensation for alleged criminal intercourse with his wife. Lord Melbourne was Prime Minister at the time, and, as a verdict adverse to him would have created a political crisis, the case aroused an enormous interest. The defendant had been

an intimate friend of Mrs. Norton, but he was old enough to be her father, and there was no credible proof of improper conduct. The case came before Chief Justice Tindal and a special jury, with Sir John Campbell, Attorney-General, leading for Lord Melbourne. The witnesses were chiefly discarded servants of damaged character, and none of them professed to be able to swear to any circumstances within the preceding three years. In the end the jury found for the defendant after a conference of a few seconds.

Follett appeared with Sir John Campbell against Disraeli in the notorious Austin's Case in 1838. Disraeli believed that Charles Austin, Q.C., had, at the trial of an Election Petition, reflected upon his conduct as candidate for Maidstone, and implied, if he had not stated, that Disraeli had promised money to the voters, which he had never paid. In this belief, Disraeli sent to the *Morning Post* a letter of a very strong character, in which he said:—

> "Mr. Austin is a member of an honourable profession, the first principle of whose practice appears to be that they may say anything, provided that they be paid for it. The privilege of circulating falsehoods with impunity is delicately described as 'doing your duty towards your client'; which appears to be a very different process to doing your duty towards your neighbour . . . . I therefore repeat that the statement of Mr. Austin was false; and inasmuch as he never attempted to substantiate it, I conclude that it was, on his side, but the blustering artifice of a rhetorical hireling; availing himself of the vile license of a loose-tongued lawyer, not only to make a statement which was false, but to make it with a consciousness of its falsehood."

Austin declared that he had never reflected, in the slightest degree upon Disraeli's conduct, and proceedings were taken against Disraeli for criminal libel. On finding his error, Disraeli withdrew the imputation, and the Court decided that it could with propriety pass over the offence unpunished.

Follett was counsel for the defence in the trial of the Earl of Cardigan, who in 1840 had fought a duel with a Captain Tuckett, in which the latter was wounded. Lord Cardigan was charged in the indictment with intent to murder *Harvey Garnett Phipps Tuckett.* The prosecution could only prove that the prisoner had fired at a person known as *Harvey Tuckett.* The counsel for the Crown were unable to show that *Harvey Garnett Phipps Tuckett* and the person known as *Harvey Tuckett* were the same individual, and Lord Cardigan was acquitted. Follett was also counsel for the prosecution at the trial of Thomas Cooper, the Chartist, and in other cases which arose out of the Chartist riots in the Potteries in 1842. Cooper, in his *Life*, written by himself, says that Follett, in prosecuting him, "used great unfairness." He states that, when he himself asked that one of the trials, in which he figured, might be adjourned to the next assizes, Follett smiled with gladness. "The ambitious, hard-working, highly intelligent man was dying," says Cooper, "and the fortnight's terrible work at Stafford, though he was paid several thousands for it, hastened his end."

Follett was counsel for the prosecution in the trial of Daniel McNaughton, who in 1843 murdered a Mr. Drummond under the impression that he was Sir Robert Peel. McNaughton appears to have imagined that Sir Robert Peel was bent upon his destruction, and he had resolved to assassinate him. The jury returned a verdict of "not guilty" on the ground of insanity. It was in consequence of *McNaughton's Case* that the judges gave their famous answers to the House of Lords on the law relating to insanity, which have since been subjected to so much criticism by legal and medical writers. Follett was also counsel, with Sir John Campbell and Mr. Wightman, for Lord De Ros in the action which he brought against Cumming and others, who charged him with cheating at cards. He was said to manipulate the cards in his own

favour by means of a trick. Sir John Campbell made a gallant fight for Lord De Ros, but a verdict was given for the defendants.

Great as was the position attained by Follett at the Bar, his health had never been robust. Brougham says that the great advocate, "contrary to the positive, but most gratuitous assertion of periodical writers, had no constitutional weakness in early life." But this is not accurate. He took an ægrotat degree at Cambridge in 1818, and in 1824 he was compelled, by the rupture of a blood vessel, to give up work for some months. When he was about forty, the inherent weakness of his constitution began to tell, and it was feared that his lungs were affected. He persevered, however, in the practice of his profession in spite of one serious illness after another. At length, in 1844, his health became so shattered that he was compelled to cease work and go abroad. It was said that his health was undermined by his severe labour, but Lord Brougham denies this assertion. "The mischief was seated far deeper than any devotedness to hard work could reach, or any relaxation from hard work could cure." He went through his labour, whether in chambers or in Court, with the ease that marks great powers, and his work never fatigued his understanding or damped his spirits. Follett's cessation from work and visit to the Continent did him no real good, and in June 1845, at the height of his mental powers and in the flower of his age, he died of consumption in London. Sir James Graham, in a letter to Croker, after Lady Follett's death, applies to him the fine words of Tacitus, "*Festinatæ mortis grande solatium tulit, evasisse postremum illud tempus; potest videri etiam beatus, incolumi dignitate, florente famâ, salvis affinitatibus et amicitiis, futura effugisse.*"

Follett's death, while at the zenith of his fame, and with the vigour of his mental faculties unimpaired, created a very deep impression. He had enjoyed wide esteem—"an esteem

that seemed," says Brougham, "to lay all envious feelings asleep"—and his funeral gave proof of the general sorrow. The Lord Chancellor, the Prime Minister, and the Chief Justice of the Common Pleas, were among those who bore the pall. Two years after the death of Follett, his devoted wife also passed away. Her heart was in her husband's tomb, and she drooped and wished to follow him.

Follett was charged with an excessive eagerness to accumulate money. It was frequently alleged against him that he accepted briefs when he could not attend to the cases. This charge is one that is made against every great advocate. Lord Brougham says that clients frequently insisted on delivering briefs, although distinctly told that he could not attend. They hoped that some unforeseen accident might make his attendance possible, or they desired to prevent his being retained by the other side. Samuel Warren endeavours to excuse Follett's love of money (he left personalty amounting to £160,000) by pointing out that he knew that his health was delicate, and that he was anxious to provide for his family in case of his premature death. Warren admits, however, that "in his excessive eagerness to accomplish his object, he was hurried into an occasional forgetfulness of that nice and high sense of moral principle which ought to regulate every one's conduct."

J. A. LOVAT-FRASER.

V.—THE STANDARD OF REASON *v.* RESTRAINT OF TRADE.

IN 1890, Congress passed what is known as the Sherman law or Anti-Trust Act, whereby every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, was declared to be illegal.

After years of controversy and debate, it can now be authoritatively stated that certain fixed and well-defined principles have been evolved from this Statute, and have been finally laid down by the United States Supreme Court.

They can be summarised as follows:—

(1) The standard of reason must be applied in construing the Statute.

(2) The standard of reason does not include those combinations that are in themselves reasonable.

(3) The words "restraint of trade" embrace—

(A) Acts or contracts or agreements or combinations which operate to the prejudice of the public interests by unduly restraining competition:

(B) Or unduly obstruct the due course of trade:

(C) Or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, &c., injuriously restrain trade.

(4) The Statute does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.

(5) The acts which the Statute prescribes can be removed from the control of its prohibition by a finding by the Court that they are reasonable.

(6) The duty of the Court to interpret, which inevitably arises from the general character of the term "restraint of trade," requires that the words should be given a meaning which will not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of inter-State commerce, the free movement of which it is the purpose of the Statute to protect.[1]

[1] *Standard Oil Case, American Tobacco Case, Miles Medical Co.* v. *Park & Sons; U.S.* v. *Reading Co.*

(7) The question whether the combination is a facility in aid of inter-State commerce or an unreasonable restraint depends upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the methods by which such control has been brought about, and the manner in which that control has been exerted.[1]

(8) The Statute is a limitation of rights—rights which may be pushed to evil consequences, and, therefore, restrained.

(9) The Statute is its own measure of right and wrong, of what it permits or forbids, and the judgment of the Courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results.[2]

(10) The consolidation of two great competing systems of railroads engaged in inter-State commerce by a transfer to one of a dominating stock interest in the other, creates a combination which restrains inter-State commerce within the meaning of the Statute, because, in destroying, or greatly abridging the free operation of competition theretofore existing, it tends to higher rates.[3]

(11) Such a consolidation directly tends to less activity in furnishing the public with prompt and efficient services, in carrying and handling freight and in carrying passengers, and in attention to prompt adjustment of the demands of parties for losses, and in these respects puts inter-State commerce under restraint.[4]

(12) Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected.[5]

[1] *U.S.* v. *Terminal Ass.* [2] *Standard Sanitary Mfg. Co.* v. *U.S.*
[3] *U.S.* v. *Joint Traffic Asso.* (171 U.S. 577); *U.S.* v. *Union Pacific R. R. Co.*
[4] *U.S.* v. *Union Pacific R. R. Co.* [5] *Ibid.*

(13) The Statute is not confined to voluntary restraints, as where persons engaged in inter-State trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraint, as where persons not so engaged conspire to compel action by others or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein.[1]

(14) The Statute applies to a conspiracy to run a corner in the available supply of a staple commodity, normally a subject of trade and commerce among the States, and thereby to enhance artificially its price throughout the country, and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied.[2]

(15) Where the producer or manufacturer has sold his product at prices satisfactory to himself, the public is entitled to whatever advantages may be derived from competition in the subsequent traffic.[3]

(16) A patentee who has parted with a patented article by passing title to a purchaser, parts with the monopoly secured by the patent law, and has no right to limit or restrain subsequent sales.[4]

(17) The copyright Statutes, while protecting the right of the owner to multiply and sell his production, do not create the right to impose a limitation at which it shall be sold at retail by future purchasers.

(18) The Statute punishes the conspiracies at which it is aimed on the Common-law footing, that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.[5]

[1] *U.S.* v. *Patten.* [2] *Ibid.* [3] 220 U.S., 373, 408.

[4] *Bauer* v. *O'Donnell*, U.S. Supreme Court, May, 1912.

[5] *Nash* v. *U.S.*, June, 1913.

But before this was accomplished the Sherman law passed through various phases of judicial construction which, while not affecting the decision in any one particular case, were bitterly academic. They lead to the inevitable conclusion that the United States Supreme Court, in the *Standard Oil Case*, deliberately repudiated its prior rulings, and that beginning with the judgment in that case the construction placed on the Anti-Trust Act, so far as relates to the question whether the law applies to all combinations in restraint of trade or commerce, or only to such as are *unreasonable*, is diametrically opposite to what it was originally. As this fact is not generally known, it may not be out of place to refer to it somewhat in detail.

The first important case that came before the United States Supreme Court in which the question whether the Anti-Trust Act applied to *reasonable* as well as *unreasonable* combinations in restraint of trade, was *United States* v. *Trans-Missouri Freight Ass.*, decided March 22nd, 1897.[1] The prevailing opinion was delivered by Mr. Justice Peckham, with whom Chief-Justice Fuller and Justices Harlan, Brown, and Brewer concurred, while a dissenting opinion was rendered by Mr. Justice White, with whom Justices Field, Shiras, and Gray concurred. It will be seen, therefore, that at the very commencement of the controversy over this question the United States Supreme Court was almost evenly divided, but, as this has been almost invariably true with its decisions on all great issues, there is nothing particularly significant in the fact. Mr. Justice Peckham in the course of his opinion said:—

What is the meaning of the language as used in the Statute, that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal?" Is it confined to a contract or combination which is only in

1 166 U.S. 290; 41 L. Ed. 1007.

unreasonable restraint of trade or commerce, or does it include what the language of the Act plainly and in terms covers—all contracts of that nature? . . . . Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the Courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at Common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at Common law or elsewhere. By the simple use of the term "contracts in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was valid and unenforceable as being in unreasonable restraint of trade. *When, therefore, the body of an Act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, &c., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the Act that which has not been omitted by Congress.*[1]

After referring to the argument that "the Statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were only in unreasonable restraint of trade," the learned Justice continues:—

But *we cannot see how the Statute can be limited*, as it has been by the Courts below, *without reading into its text an exception which alters the natural meaning of the language used*, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the Statute more in accord with the intent of the law-making body that enacted it.[2]

It only needs a cursory reference to the dissenting opinion of Mr. Justice White, to show that the main issue involved

[1] Pages 327, 328. [2] *Ibid.*, 329

in this case was on the construction of the Anti-Trust Act, and whether it applied to *reasonable* as well as *unreasonable* combinations in restraint of trade. He says:—

> The theory upon which the contract is held to be illegal is, that even though it be *reasonable*, and hence valid, under the general principles of law, it is yet void, because it conflicts with the Act of Congress already referred to . . . . To state the proposition in the form in which it was earnestly pressed in the argument at Bar, it is as follows: Congress has said, every contract in restraint of trade is illegal. When the law says "every," there is no power in the Courts, if they correctly interpret and apply the Statute, to substitute the word "some" for the word "every." If Congress has meant to forbid only restraint of trade which were *unreasonable*, it would have said so; instead of doing this it has said *every*, and this word of universality embraces both contracts which are *reasonable* and *unreasonable*. . . . . I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which *unreasonably* restrain trade, and therefore that *reasonable* contracts, although they in some measure "restrain trade," are not within the meaning of the words.

After reading the foregoing extracts from the prevailing opinion of the Court rendered by Mr. Justice Peckham, and the dissenting opinion of Mr. Justice White, no reasonable mind can contend that the precise question as to whether the Act applies to *all* contracts in restraint of trade, or only to such as are *unreasonable*, was not directly involved: was not fully argued and was not decided in that case.

The next important case involving the construction of the Anti-Trust Act that came before the United States Supreme Court was *United States* v. *Joint Traffic Association*, decided October 24th, 1898. The Court in that case re-affirmed its decision in *United States* v. *Trans-Missouri Freight Association*, Justices Gray, Shiras, and White dissenting. That the Court then deliberately re-affirmed its prior ruling, to the effect that the Anti-Trust Act applied to all combinations in restraint of

trade, irrespective of whether they are or are not *reasonable*, amply appears from the opinion of Mr. Justice Peckham, who among other things said:—

Finally, we are asked to reconsider the question decided in the *Trans-Missouri Case*, and to retrace the steps taken therein, because of the plain error contained in that decision, and the widespread alarm with which it was received, and the serious consequences which have resulted, or may soon result, from the law, as represented in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this Court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the Court, or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The Court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the Court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri Case* shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the Court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the Court. *It was after a full discussion of the question involved, and with the knowledge of the views entertained by the minority, as expressed in the dissenting opinion, that the majority of the Court came to the conclusion it did.* Soon after the decision a petition for the rehearing of the case was made, supported by a printed argument in its favour, and pressed with an earnestness and vigour and at a length which were certainly commensurate with the importance of the case.

This Court, with care and deliberation, and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the Court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the third time the

same arguments are employed, and the Court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the *Trans-Missouri Case.* The learned counsel, while making the application, frankly confess that the argument in opposition to the decision in the case above-named has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr. Justice White, that it is hardly possible to add to it nor is it necessary to repeat it. The fact that there was so close a division of opinion in this Court when the matter was first under advisement, together with the different views taken by some of the judges of the lower Courts, led us to the most careful and scrutinising examination of the arguments advanced by both sides, and it was after such an examination that the majority of the Court came to the conclusion it did. It is not now alleged that the Court on a former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the Court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed. As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some case properly reconsidered and over-ruled, yet it is clear that the first necessity is to convince the Court that the decision was erroneous. It is scarcely to be assumed that such a result could be secured by the presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the Court. We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the Court to again give to those arguments strict and respectful attention. *It is not matter for surprise that we still are unable to see the error alleged to exist in our former decision or to change our opinion regarding the questions therein involved.*

On May 19th, 1902, the case of *E. Bemont & Sons* v. *National Harrow Co.* was decided by the Court, Justices

Harlan, Gray, and White, however, taking no part in the decision as they did not hear the argument; but in this case Mr. Justice Peckham again writing the opinion, the Court said:

> It is true that it has been held by this Court that the Act (Anti-Trust) included any restraint of commerce, *whether reasonable or unreasonable.*[1]

On March 14th, 1904, in *Northern Securities Co.* v. *United States*, the United States Supreme Court again re-affirmed its previous ruling on this question of the construction of the Anti-Trust Act. In delivering the judgment of the Court, Mr. Justice Harlan, in an exhaustive and brilliant opinion, said:

> Is the Act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or does it embrace only such restraints as are unreasonable in their nature? . . . . We will not encumber this opinion by extended extracts from the former opinions of this Court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are: . . . . That *the Act is not limited to restraints* of inter-State and international trade or commerce *that are unreasonable* in their nature, but embraces *all* direct restraint imposed by any combination, conspiracy, or monopoly upon such trade or commerce.[2]

Chief Justice Fuller and Justices White, Peckham, and Holmes dissented, and while Mr. Justice Brewer concurred in the opinion of the majority, he took occasion to depart from the proposition that the Anti-Trust Act applied to all restraints, whether *reasonable* or *unreasonable.* This was the first indication of a shifting of opinion, and was the beginning of that entire change of front that subsequently repudiated the Court's prior construction of this Act of Congress in the case of the Standard Oil Co. After referring

[1] 186 U.S. 92; 46 Law Ed. 1069. [2] 193 U.S. 331; 48 Law. Ed. 698.

to the numerous cases decided by the Court, Mr. Justice Brewer said:—

While a further examination has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons for the judgments cannot be sustained. Instead of holding the Anti-Trust Act included all contracts, *reasonable* or *unreasonable*, in restraint of inter-State trade, the ruling should have been that the contracts there presented were *unreasonable* restraints of inter-State trade, and as such within the scope of the Act.

The United States Supreme Court was not, however, yet so constituted as to repudiate entirely its prior reasons for its construction of the Sherman Act, nor had Mr. Justice White become Chief Justice of the United States.

In 1908 two cases appear to have crept before the United States Supreme Court unnoticed, in both of which the prior construction of the Anti-Trust Act was re-affirmed, and without any dissenting opinion. The first case was *Loewe* v. *Lawlor*, decided February 3rd, 1908,[1] in which Chief Justice Fuller, delivering the unanimous judgment of the Court, said:

United States v. *Trans-Missouri Freight Asso.*; *United States* v. *Joint Traffic Asso.*; and *Northern Securities Co.* v. *United States* hold, in effect, that *the Anti-Trust law has a broader application than the prohibition of restraints of trade unlawful at Common law.* Thus, in the *Trans-Missouri Case*, it was said that "assuming that agreements of this nature are not void at Common law, and that the various cases cited by the learned Courts below show it, the answer to the statement of their validity now is to be found in the terms of the Statute under consideration"; and, in the *Northern Securities Case*, that the Act declares "illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States."

The second case was *Shawnee Compress Co.* v. *Anderson*, decided April 13th, 1908, in which Mr. Justice McKenna, in

[1] 208 U.S. 297; 52 Law Ed. 497.

delivering the unanimous opinion of the Court, and after quoting the provision of the Sherman law, said:

And it has been decided that not only *unreasonable*, but *all* direct restraints of trade are prohibited, *the law being thereby distinguished from the Common law.*[1]

It is difficult to find language more comprehensive in its terms distinguishing the Anti-Trust law from the rule of the Common law, and holding that its provisions cannot be construed by what was or was not a lawful restraint of trade at Common law, and that the Sherman law must be construed according to its own terms, and not otherwise.

When the *Standard Oil Case* came before the United States Supreme Court in 1911, the composition of the Court had undergone many changes. Mr. Justice White, who wrote the dissenting opinion in the *Trans-Missouri Freight Case*, had become Chief Justice. Mr. Justice Peckham, who wrote the prevailing opinion in that case, was dead, and the only Justice who concurred with him still on the bench was Mr. Justice Harlan. Whether justified or unjustified—whether right or wrong—the United States Supreme Court in the *Standard Oil Case* revoked the theory that the Anti-Trust Act applied to combinations in restraint of trade, whether *reasonable* or *unreasonable*, and adopted the construction that the law is limited only to such as are *unreasonable*. As the question whether any given combination is *unreasonable* must finally be determined by the Court of last resort, and as thus far in all the mass of Anti-Trust litigation hardly a case has been held by the United States Supreme Court to have been a *reasonable* restraint, there would not appear to be any cause to fear that the later construction of the Sherman law would result otherwise than in a judicious and wholesome manner, and that after all, in the administration of justice, it makes very little practical difference which construction is put upon the law. The result in either case is substantially the

[1] 208 U.S. 434; 52 Law Ed. 875.

same—illegal combinations are condemned—and it is to be hoped that the general public policy of the government to suppress improper interference with trade and commerce between the States and with foreign nations will in the future be sustained as it has been in the past.

The substance of the decision in the *Standard Oil Case* is that the Sherman law only intended to prohibit those combinations that unduly restrain trade or commerce, and that the rule by which such combinations are to be judged is the standard of reason. The learned Chief Justice then said:

> The Statute under this view, evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain inter-State or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference—that is, *an undue restraint*. . . . Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at Common law and in this country, in dealing with subjects of the character embraced by the Statute, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the Statute provided.

But the difference of opinion between Chief Justice White and Mr. Justice Harlan on the construction of the Sherman law still continued after the decision of the *Standard Oil Case* with the same unrelenting persistency. This is well brought out in the *American Tobacco Case*, which almost immediately followed the judgment in the *Standard Oil Case*. Chief Justice White, not entirely satisfied with his own reasoning in the former case, and still uneasy over Mr. Justice Harlan's persuasive dissenting opinion, sought, in the *American Tobacco Case*, to strengthen his former position by boldly asserting that the United States Supreme Court had in fact never decided anything differently. "In that" (Standard Oil) "case," said the Chief Justice, "it was held, without

departing from any previous decision of the Court, that as the Statute had not defined the words 'restraint of trade,' it became necessary to construe those words—a duty which could only be discharged by a resort to reason. *We say the doctrine thus stated was in accord with all the previous decisions of this Court,* despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions." What reply had Mr. Justice Harlan to make to this assertion? It is found in his dissenting opinion — in the strenuous and dignified but discouraged protest against what he persistently stigmatised as making, by judicial construction, a law which Congress did not make:

If I do not misapprehend the opinion just delivered, the Court insists that what was said in the opinion in the *Standard Oil Case* was in accordance with our previous decisions in the Trans-Missouri and Joint Traffic cases, if we resort to reason. *This statement surprises me quite as much as would a statement that black was white or white was black.* It is scarcely just to the majority in these two cases for the Court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the Court now does, that the Act was, for the first time, in the *Standard Oil Case,* interpreted in the "light of reason." One thing is certain, "rule of reason," to which the Court refers, does not justify the perversion of the plain words of an Act in order to defeat the will of Congress.

No one ever wore the robe of a Justice of the United States Supreme Court with more conspicuous and befitting distinction than Rufus W. Peckham and John Marshall Harlan. Their memory stands out in bold relief as among our greatest constitutional lawyers—jurists who above ordinary men possessed the keenest understanding of our political and constitutional form of government, and who realised what so few even of our statesmen or judges realise, that the security, happiness, and prosperity of the American people can only be secured by a faithful and

rigid severance at all times and under all circumstances of the executive, legislative, and judicial functions of government. They scorned with contempt the mere playing with words and metaphysical opinions that attempted to undermine what they regarded as the foundation of our existence as a nation, and sought with undiminished zeal throughout their long and honourable judicial careers to maintain the principles of American constitutional liberty as they found them in their pure and pristine simplicity. They were great men—great lawyers—great judges—those whose memory is dear to every lover of American Constitutional law.

The day was (1897 to 1911) when the construction put on the Anti-Trust Act was the law of the United States.

The day came (1911) when that construction ceased to be the law of the land.

The day was (1897) when the dissenting opinion of then Mr. Justice White was not the law of the United States.

The day came (1911) when it became the law of the land.

Is it not possible, and in view of the shifting and unstable composition of our greatest Court, is it not probable that the day may yet come when the prevailing opinion of Mr. Justice Peckham in the *Trans-Missouri Case* and the *Joint Traffic Cases*, and the dissenting opinion of Mr. Justice Harlan in the *Standard Oil Case*, may once again become law ?

But the vacillation—the swaying to and fro—the uncertainty of mind and fluctuation of opinion in the cases referred to, is not as much to be feared as the differences of views of an almost equally divided Court in the case of the *Northern Securities Co.* v. *United States.* The amount in that decision involved hundreds of millions of dollars, and yet it depended at the crucial moment on the opinion of a single judge, as the Court finally stood five to four, Chief Justice Fuller and Justices Peckham and

Holmes concurring in the dissenting opinion of Mr. Justice White. When I refer to the doubt and uncertainty the decision in this case has caused and still causes, I do not wish to imply that the case was not well and properly decided, but I desire to point out that in view of the elaborate dissenting opinion of Mr. Justice White, now Chief Justice of the United States, that no one knows and no one can foretell what the United States Supreme Court may do when the same question again comes before that tribunal for decision. There is no reason to imagine that the present Chief Justice would abandon the position he then assumed, or relinquish one tittle of the argument he then vigorously presented. While the majority held that the case came within and was covered by the Anti-Trust Act, Mr. Justice White took the opposite view; he went further and *denied the power of Congress* to "*regulate the ownership of stock in railroads, which is not commerce at all.*"

In view of the unrest—the uncertainty, suspense, and suspicion—caused by the great diversity of opinion, is it at all certain that in the near future the ruling in the *Northern Securities Case* will be sustained; but, on the contrary, is it not more than possible that the reasoning of the minority in that case be adopted, and the views of the majority disowned? Chief Justice White finally triumphed in his construction of the Anti-Trust Act; may he not also finally triumph in his views that a combination to regulate the ownership of railroad stock is not commerce, and therefore not within that law?

In the *American Tobacco Company Case*, the history of the combination was replete with the doing of acts which it was the obvious purpose of the Statute to forbid, was demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to

contract and to trade, but by methods devised in order to monopolise the trade by driving competition out of business, which was ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. It was not the dominion and control of the tobacco trade that was condemned, but the wrongful and illegal combination as a vantage ground to monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business, or compelling them to become parties to the combination. This purpose was illustrated by the plug war which ensued, and its results; by the snuff war which followed, and its results; and by the conflict which immediately followed the entry of the combination in England, and the division of the world's business.[1]

One of the most important and far-reaching decisions under this law has, however, received little public notice. It held a combination or corner in cotton as coming within the purview of the Statute. Upon the corner becoming effective, say the Supreme Court of the United States, there could be no trading in the commodity, save at the will of the conspirators and at such price as their interests might prompt them to exact. And so the conspiracy was to reach and bring within its dominating influence the entire cotton trade of the country.[2]

One of the great legislative problems of the day is to protect fair competition in the business world without unduly interfering with the freedom of contract. We may properly presume that the problem is greater in some lines of business than in others. In the purchase of commodities, the methods of business adopted are quite as various as the different commodities. Methods are adopted which

[1] *U.S.* v. *American Tobacco Co*, May, 1911
[2] *U.S* v. *Patten*, Nov, 1912.

are peculiar and limited to dealings in a certain commodity. Evil practices, therefore, may arise in the business methods pertaining to one commodity, which do not obtain at all in relation to other commodities. Practices may obtain which contravene no Statute, and which, nevertheless, would be deemed as morally dishonest and detrimental to the public interest. If it is true that large corporations enter a specified business and cover a large territory, including many purchasing points, and if it be true that they resort to methods which would be deemed morally dishonest and unjust in order to obtain a monopoly of that particular business in the territory which they so occupy, then a situation is presented which fairly calls for legislative attention. The legislative problem thus presented is manifestly a difficult one. The resulting legislation may not be the best. But a legislative Act which is directed against such *particular* evil ought not for that reason alone to be regarded as capricious and arbitrary in its classification. The temporary maintenance of artificial prices for the sole purpose of destroying a weaker competitor and creating a monopoly is one of the modern evil inventions. All that is required for its sure success is that there be great inequality of financial resources in favour of the offending party.[1]

The consideration of this important subject necessarily leads to the conclusion that the business of buying or of selling a specified commodity, when carried on by parties controlling ample capital, with large central plants and local purchasing or distributing points extending over wide territory, affords special facilities and motives for the creation of monopolies by the temporary maintenance of artificial prices at competitive local points.[2] This, however, can be stopped by local legislation where the Federal government is helpless, and it is one of the hopeful signs of progress to be able to note the decided steps already taken in this direction.

[1] 133 N W. R. 898. [2] 134 N W. R. 497.

A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious; and this is particularly true in connection with those trades and commercial undertakings which, although innocent and harmless in themselves, become through improper discrimination objectionable.

It is true that it is the right of every citizen to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and conditions. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted licence to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is the liberty regulated by law. The right to acquire, enjoy, and dispose of property is declared in many Constitutions to be one of the inalienable rights of man. But this declaration is not held to preclude the Legislature of any State from passing laws respecting the acquisition, enjoyment, and disposition of property.* What contracts respecting its acquisition and disposition shall be valid, and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged, are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas* is a maxim of universal application.[1]

[1] 137 U.S. 90.

There is no evil in a trust, pool or combination, even when in restraint of trade, provided the restraint is fair and reasonable. If public policy condemns unjust and unreasonable restraints of trade, it is because public policy requires that all men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred.[1]

With respect to contracts in restraint of trade, the public interest is the first consideration. To sustain the restraint, it must be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary under the circumstances for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. Public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not unreasonable.[2]

If the contract can be said to restrain trade unreasonably, then it is against public policy; but it is not always easy to determine precisely what public policy is in any given case. The determination of what contracts are and what are not against public policy is usually attended with much difficulty, as the term public policy will not admit of exact definition. Public policy in one part of the country may or may not be the public policy of another part. Likewise, the public policy of one time may or may not be the public policy of another time. Our complex and changing civilisation is especially marked and distinguished by our view of public policy, which is not the same to-day as it was a decade ago, or as it probably will be a decade hence. Whatever it may

[1] L. R. [1875], 19 Eq. 465. [2] 220 U.S. 373.

be or may not be, all authorities agree that public policy in a State is declared and made certain when disclosed by a sustained line of decisions by the judicial branch of government, or by the legislative branch when it finds definite and exact expression in statutory enactments. And when the public policy of a people is thus crystallised into law, such law will be deemed to be the final word in expressing the popular policy in that behalf.[1]

In the definition of public policy, Courts have never been able to improve on the language of Justice Story, who said:—

Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness . . . Wherever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void as being against public policy.

As an illustration of pools and combinations in restraint of trade, but that have yet been held to be lawful, one can refer to the various combinations in vogue throughout the western and southern States of the United States among the farmers and growers of cotton and tobacco for the pooling of their crops. These combinations are, as a rule, the result of express legislative authority authorising any number of persons to combine, unite, or pool crops of wheat, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling, or disposing of the same. Referring to the Statute of Kentucky permitting such pooling by producers, and the causes that led to such legislation, the Supreme Court of that State say:—

The conditions which gave rise to the Act are known to all men. At the time of its enactment there was but one buyer for the farmer's tobacco. It mattered not how hard he laboured, how valuable his

[1] 100 N.E. 92; 166 U.S. 290; 41 L. 1097

soil, or how fine the quality of crop, he was obliged to accept whatever the buyer might offer. Indeed, in many instances, the buyer absolutely refused to examine his crop or make any offer at all. Instead of the plenty to which he was accustomed and to which he was entitled, he stood face to face with privation and want. As individuals the farmers were unable to cope with the situation.[1]

And again—

The farmers scattered all over the State, each acting independently and separately for himself, were unable to dispose of their crops at a fair and reasonable price. There was practically no competition among the purchasers of the crops. A combination and Trust had been formed by the buyers to depreciate the value of the crops below the real value, and single-handed the producers were unable to compete or deal in terms of equality with these Trusts and combinations that controlled the markets in which the farmer was obliged to dispose of his produce. To meet the condition of affairs thus presented, *and to enable the farmers to combine* their resources, and place their products in the hands of an agent selected by them to the end that better prices might be obtained, this Act was passed.[2]

We have thus presented the unique example of a combination or pool in restraint of trade, not only as essential in order to meet and successfully combat the evils of an unjust, unreasonable, and therefore unlawful combination or Trust, but authorised by law. The test of lawfulness is, whether the combination is for the purpose of depreciating the commodity below or enhancing it above its true value. As long as such combinations do not accomplish more than secure a fair and adequate price for their product, such acts cannot be held to be in conflict with the morals of the time, or to contravene any established interest of society. Public policy, say the Appellate Court of Indiana, does not ask those who till the soil to take less than a fair return for their labour. Public policy safeguards society from oppression; it is not an instrument of oppression.[3]

[1] 137 Ky. 233. [2] 128 Ky. 152. [3] 100 N.E. 89.

The Legislatures of the different States of the Federal Union have it within their power, by judicious and well-devised legislation, to crush out the evils of Trusts. Once adopting the policy that all acts, schemes, and combinations interfering or in any way destructive of free competition—all efforts to throttle individual trade and business, are a menace to the well-being of the State and Society—they can by law make it practically impossible for the Trust to continue to live, and thus emancipate its commercial and industrial interests and its citizens from existing tyranny.

Several of the United States have adopted laws providing that any person, firm, company or corporation, engaged in the business of buying milk, cream, or butterfat for manufacture, or poultry, eggs, or grain for sale or storage, that shall, for the purpose of creating a monopoly or destroying the business of a competitor, discriminate by purchasing such commodities in one section or locality at a higher price than they pay for the same articles in another section or locality, is liable to fine or imprisonment. Thus Minnesota has confined her law to the purchase of milk, cream and butterfat; Iowa has extended it so as to include poultry, eggs or grain; while South Dakota has made the first determined radical advance by not limiting the discrimination to the purchase of specified commodities, but embracing the sale of any commodity in general use. These States have taken action in the right direction, and by legislation are beginning to define and limit unjust interference in business; they are paving the way by carefully prepared prohibitory measures, with fine and imprisonment as a moral suasion, to induce the Trusts to let the tradesman alone, and soon all over the land these local safeguards will have become so completely established that individual enterprise and business will not only have become possible, but secure from molestation. These laws are aimed at unfair competition in trade, and come within the general constitu-

tional power of the State. A law of South Dakota provides that anyone engaged in the production, manufacture, or distribution of any commodity in general use, who intentionally, for the purpose of destroying the competition of any regular established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of the State by selling such commodity at a lower rate in one section than such person charges for such commodity in another section, is punishable by fine or imprisonment. One charged with unfair discrimination under this law was found guilty, and the case was eventually appealed to the Supreme Court of the United States. That Court, in affirming the conviction, among other things said:—

If the Legislature shares the now prevailing belief as to what is public policy, and finds that a particular instrument of trade war is being used against that policy, in certain cases it may direct its laws against what it deems the evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed.[1]

Missouri has its Anti-Trust law which condemns every restraint of trade, great or small. It closes the only door through which doubts as to its construction could enter, by positively prohibiting defined combinations without regard to what the Courts may think as to the extent of their effect. In 1905, a small ice company was carrying on business at Kansas City. There were other companies in the field who combined, and after fruitless efforts to get the first company to agree to an advance in the cost, within sixty days they drove their little rival into bankruptcy. In a suit on behalf of the State, the defendants were heavily fined, and the charter of one of the defendants revoked.[2]

[1] *Central Lumber Co. v. State South Dakota*, Dec., 1912. [2] 151 S. W. R. 101.

So agreements that have for their object the control and regulation of future prices of commodities, such for instance as proprietary medicines, among jobbers and retailers, are contrary to public policy. Combinations among dealers having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest, and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. No distinction can be made by reason of the particular commodity in question. If an article of commerce, then the rules concerning the freedom of trade must be held to apply to it. Where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. Commodities once having been sold at prices satisfactory to the manufacturer or seller, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.[1]

As has been held by the Supreme Court of the United States, regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State.[2]

The right to compete in any legitimate business in lawful ways and by lawful means is sacred and cannot be interfered with; but this right to compete in business does not justify unfair competition.

[1] *Dr. Miles Medical Co.* v. *John D. Park, &c.*, April, 1911.
[2] 44 Law Ed. 728.

Whether trade is considered in its broad, comprehensive sense as commerce, or in its narrower application as affecting the individual in the pursuit of his living, matters little, as in either case unlawful combinations to interfere with one's business or an individual's own vocation are equally reprehensible and come within the condemnation of the law.

In the United States, fortunately, individual liberty is secured by the Federal Constitution, the various State Constitutions, and the Bills of Rights, and if it were not for these safeguards, public delirium which at times seizes legislative bodies and compels them to enact laws in favour of trade unions and labour organisations to the detriment of individual rights, might work serious mischief. But even where the criminal features of fine and imprisonment have been dropped, in connection with conspiracy to deprive another of the opportunity to earn his livelihood, yet the unlawfulness of the act remains with the corresponding right of redress in damages. It is unlawful to deprive a mechanic or workman of work by force, threats, or intimidation of any kind: a combination of two or more to do the same thing by the same means is a conspiracy. So in Pennsylvania, where the members of a trade union demanded the dismissal of an engineer within 24 hours or they would leave, and the engineer in consequence was dismissed, he was entitled to recover damages from those who demanded his discharge.[1]

In this connection, an interesting case came before the Court of Appeal in London last January,[2] where a woman, a cigar maker, was requested to join the union, but declined. Subsequently, the proprietor told her "the workpeople refuse to work with you, and will strike if you do not join in. You will have to go." It was held there was no evidence of a threat, and the suit brought by the poor, helpless woman for

[1] 85 Atlantic, 765.

[2] *Daily Telegraph*, Jan. 21, 1913, p. 4.

redress was dismissed. Without questioning the justness of the judgment, it would seem that if this is the state of the law, then the law should speedily be changed, for it is a parody on English justice to permit such an outrage to be perpetrated and leave the workman or woman helpless and without the opportunity of earning an honest living.

The ready answer of those accused of an unreasonable restraint of trade is that prices may frequently be too low for the public good; that competition may be carried far enough to hurt everybody concerned, and may, in the end, cause a monopoly; that under its stress all but the strongest producers may go to the wall. But to this argument the State replies, that if all makers of an article of common use combine to raise and maintain prices, and to punish any one of their number who reduces them, all the evils which the common experience of mankind knows result from monopolies will surely follow. As the United States Circuit Court cleverly puts it, in the *Bath Tub Case*, "There never has been a time when most men, however much they disliked price agreements in things they bought, but did not sell, were not able to persuade themselves that there was nothing wrong in agreeing to keep up the prices of things they sold, but did not buy." [1]

Another pretext is, that the combination relates to the sale or licensing of a patented article in which the owner is protected, and this was the ground of defence by the Bath Tub Trust. Judge Rose, however, who delivered the opinion in that famous case, riddled and ridiculed this pretension by showing that the ware used by the Trust was unpatented. Said that learned judge:

Anyone may sell it as freely as he may a loaf of bread. No one can tell by looking at a bath-tub whether enamelled powder has been sprinkled upon it by a patent dredger any more than anyone who eats a loaf of bread can tell whether it has been baked in an oven

[1] 191 Fed. 189.

with a patented grate, or who lights a kerosene lamp can tell whether, in the process of refining a patented tool has been used, or by taking a pinch of snuff can be sure that there was or was not a patented mill used in grinding the tobacco.

What is the remedy? One, it is said, can be found in the statesman and the legislator. But who form the statesmen and the legislative bodies? Lawyers. It is the lawyer, then, who after all, is responsible, and it is on the degree of his moral fibre and high standard of intelligence and integrity that the welfare of the people at large rests. This is no idle theory. The responsibility of the legal profession towards the State is great. Governors of States, members of the Legislature, and Judges, are almost entirely drawn from the ranks of the legal profession. It is the lawyer, therefore, who, above all other callings in life, is the most important factor in adjusting the problem of what shall or shall not constitute public policy in the protection of the rights of the people, and in the redress of their wrongs "The people," says the Hon. C. C. Hadley, ex-Judge of the Indiana Appellate Court, "may feel the burden of oppression and injustice. They may see a glimmering of light for their relief; but upon a lawyer must fall the duty and responsibility of formulating that relief into legislative action or judicial determination. Learning, honour, and integrity are alike necessary in these great trusts. The future stability of the country rests in a very large measure on those who make and execute the laws, and our guarantees for the peaceful enjoyment of life, liberty, and property, must be sought in their character and moral qualities."

It may be that what is needed is decentralization—the segregation of the various trades and commercial and industrial pursuits—so that one individual firm or corporation shall follow and adhere to but one line of trade. Let an individual or a firm make boots—retail or wholesale,

it matters not, as long as boots are the only product—and leave it to another individual or firm to manufacture toy-chickens; but do not allow the bootmaker, with his vast capital and thoroughly organised administrative department, to also spread toy-chickens on the market, and thus cripple, if not destroy, the other manufacturer's legitimate and prosperous business. Both, if left alone, and if prevented from intruding on the other's legitimate branch of business, might prosper, while if either is allowed to absorb the other's trade, one of them will be ruined, and this only means disaster to the community.

One might well soliloquise thus: I, a skilled worker of tobacco, possess a knack of twisting a leaf so that the product is a better and more saleable and attractive cigar than that ordinarily made in the factory. I am conscious of my skill, and tell my friends I am about to open a little cigar store of my own, and they appear delighted. I find my shop. I establish myself with my family there; my friends patronise me, and my future—the possibility of earning an honest living by myself, and for myself—appears assured. But no. The Tobacco Trust will not allow of any interference—no poaching on its domain, which is co-extensive with the markets of the world—so I am under-sold; I am persecuted; I am harrassed until ruin and starvation stare me in the face, and I am sold out and my shop closed. Then, instead of being a free, independent member of the community, having and owning my own place of business where I and my family dwell, instead of having the consciousness that I, as an individual, form a separate and distinct part (insignificant though it be) of the visible part of the town, I am forced to join an army of several thousand workers in a huge factory; to live as a mere speck in a huge mass of human toilers; to dwell in an over-crowded tenement; to abandon all hope of better days, and realise the sad hopelessness and despair of life, through no fault of my own.

This pathetic picture is one of ordinary every-day experience. It shows the necessity of treating this question otherwise than from a monetary, economic point of view, and how it involves human life and its protection and the morals of a people far more than commerce and industry. The foreshadowing of how such a condition might be brought about by the unreasonable restraint of trade has received judicial recognition from the highest Court in the United States. After reviewing the changes in labour and trade caused by the natural evolution of the world's progress, the Court said:

It is wholly different, however, when such changes are effected by combinations of capital, whose purpose in combining is to control the production or manufacture of any particular article in the market, and by such control dictate the price at which the article shall be sold, the effect being to drive out of business all the small dealers in the commodity, and to render the public subject to the decision of the combination as to what price shall be paid for the article. In this light it is not material that the price of an article may be lower. It is in the power of the combination to raise it, and the result in any event *is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business, and who had spent their lives in it, and supported themselves and their families from the small profits realised therein.* Whether they be able to find other avenues to earn their livelihood is not material, *because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it may be, into a mere servant* or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the Company, and bound to obey orders issued by others.[1]

The difficulty in solving this great problem of the day is to find some way of protecting the general public against monopolies and combinations without compelling business men to subject themselves and their capital to all the perils

[1] 166 U.S. 324; 41 L. 1021-2.

of unrestrained competition. To find its solution is the work of the statesman. The "standard of reason" is, like fraud, an abstract proposition incapable of exact definition. It can only assume shape when invoked in connection with the facts of a particular case, when the standard of reasonableness has to be worked out.

No mere combination of capital—no aggregation of wealth—is in itself a menace to the State or well-being of the community. On the contrary, it is the foundation of its prosperity and progress. But when capital is combined and centralized with the object of coercing others—of obliging those of less or little wealth to succumb to the dictates of the combination—then a grievous wrong is perpetrated.

A vast amount has been said and written in recent years about Trusts, about their evils and their remedy; but the one short and sure road to their overthrow has been generally ignored. They have been attacked as illegal organisations or corporations. Suits on the part of the Federal Government alone have involved millions of dollars in legal expenses; has upset the financial markets of the Continent, and, when successful, has resulted merely in the huge mastodon reducing its size into the shape of many little baby mastodons, who continue to browse and frolic on the public green, and who bear in every detail a strong and striking resemblance to their offending parent. All this is but a waste of time, money, intelligence and force. It is attacking a recognised evil in the wrong way; it is but smoothing the rough surface without getting at the roots.

Combinations in restraint of trade—in restraint of freedom of selection and disposal—in restraint of the liberty of the individual to work where he will, and as he will, and when he will—have been combatted from a monetary point of view. It has been a question of money or property—of pecuniary

gain or loss that has interested the public, while the great evils of such combinations have been left alone, or if known, have been ignored. As Charles Edward Russell well says: "The weakness of the Anti-Trust movement so far is, that it is economic instead of humanitarian and moral." And it is precisely here that the error lies. The public must be aroused to the necessity of self-protection; to the need of saving those of their fellow creatures who are too weak and helpless to aid themselves; to a sense of the great moral wrong and social injury that all such combinations commit; the public must arouse itself to the necessity of not tolerating in its midst the commercial leper any more than those contaminated with disease. Public opinion must not only mark all such business, commercial, and industrial combinations, whether among masters or among men, with its condemnation, but insist on the strict and rigid enforcement of the laws, and then and not until then will the State emerge into that liberty of thought and action which is the object and purpose of a free and enlightened government.

C. A. HERESHOFF BARTLETT.

VI.—CURRENT NOTES ON INTERNATIONAL LAW.

Panama Canal Tolls.

SIR ERLE RICHARDS has published in the form of a pamphlet an address delivered by him, at Oxford, on the Canal question. It is, as was to be expected, an excellent statement of the British case, put forward with moderation and great skill. The common view is adopted, that the Hay-Pauncefote Treaty applies to the Panama region (although the Clayton-Bulwer Treaty was never invoked in the parallel case of the Panama Railway). This

position has already been fully analysed in the *Law Magazine*. It is only necessary here to advert to a point which Sir Erle Richards makes against those who maintain that a system of rebates granted by the United States to United States' shipping would not infringe the Treaty, supposing it to be applicable. It is maintained by them that the Treaty is satisfied by the United States charging equitable dues, proportionate to the cost of construction and maintenance of the Canal, to all vessels alike. If she chooses to subsidise her own vessels, if even she chooses to encourage them by subsidies to use the Canal. that is a matter entirely beyond the Treaty's scope. To this method of reasoning, Sir Erle Richards replies that, by a parallel course of argument, the treaties which secure equal treatment to various nations in the matter of customs duties would be rendered nugatory. By a system of rebates, the contracting Power could impose high duties, simply to remit them in favoured cases.

But, with respect, the cases are not analogous. Such action, in the case supposed by Sir Erle Richards, would really be an imposition of varying duties, and an evasion of the promise of equality. It would be raising the sum required by the taxing authority unequally instead of equally. But in the case of the Canal dues, there is a norm provided; a standard to which the provision of equality is naturally and easily referred. This is afforded by the sum required to pay for the Canal and its upkeep. The whole provision is directed to ensuring that no nation shall have to pay an unfair proportion of this ascertainable cost. Beyond this, each nation is free to stimulate or discourage Canal traffic in any way it likes. There is no obligation on Germany or Greece (should they adhere to the Treaty) to treat the Canal as a sacred thing, the use of which they must neither encourage nor penalise. The United States are

surely under no more stringent an obligation. All that the provision can fairly mean is that the necessary charges shall be evenly distributed. We need not go so far as to say that, so long as the Canal does not pay its way, the United States may charge what variegated tolls they like. But the provision for equality seems clearly referable to an equal sharing of burdens, and not to any question of their ultimate incidence. There would not exist "entire equality," if British ships were admitted to the Canal with the capacity of enjoying a subsidy from their Government which the vessels of the United States were forbidden to accept from them.

The "New" Monroe Doctrine.

The dovecotes were somewhat fluttered when the United States President was lately reported as having said that the favourite "Monroe" doctrine, in order to cope with the subtleties of modern "pacific penetration," must be extended so as to discourage the introduction of European capital into American countries. Since these countries must have capital, if they are to be developed and made prosperous, such a declaration was tantamount to saying that they must either remain undeveloped or become a preserve for the American capitalist. A very practical point was given to the Presidential remarks by the simultaneous withdrawal by Lord Murray of his offer to initiate large works in Colombia. Great uneasiness was thus created which it cannot be said has been altogether dispelled. As early as 1898, Mr. Reddaway, in his book on the Monroe doctrine, had spoken of "commercial autocracy" in this connection. Let it be said at once, there are circumstances in which the best way of getting a nation into one's power is to lend it money. Egypt is the stock illustration of this. Mr. Diosy has observed that Japan long hesitated to invoke the aid

of foreign capital on account of the servility to which bondholders had reduced the kingdom of the Nile. Perhaps other instances of the danger are more difficult to find than to imagine, though Venezuela comes very near to affording one.

It is not, of course, the mere financial obligations, heavy as these may sometimes be, that constitute the supposed inroad upon the national independence. The dangerous probability is that the creditor nation will interfere with the internal affairs of its debtor, either by total or partial annexation, or else by seizure of customs, or by a more or less veiled dictation of measures which it thinks useful for its security. It is a moot question whether a nation can ever have the right to go to war with another merely because its subjects cannot get their money from it. There is much to be said for the view that persons who put their money or their credit at the disposal of a foreign sovereign do so at their own risk. Even if this is not the case, there is something shocking in the idea of enforcing payment of a mere financial obligation by an attack which the people of the State assaulted are bound to repel with their lives. This was felt by all the States assembled at the Hague Peace Congress of 1907—except by the United States of North America. The assembly—so little prone to unanimity on other points—was practically at one in accepting the Drago doctrine, which declares the inadmissibility of debt-collecting by gunboats. The United States insisted on enforcing the claims of themselves and their subjects by fire and sword, premising only that the claim should have been allowed as good by a disinterested tribunal. But they were alone in that attitude. We now see its corollary. Loans and concessions are not really dangerous to anybody's independence unless they can be made an occasion of forcible invasion. If they cannot be made an occasion of invasion, they cannot

be obnoxious to the Monroe doctrine. But if the danger of invasion is declared to attach inseparably to the admission of foreign capital, then the field is open for the advancement of the proposition that European capital is an unsafe commodity for American States.

As a matter of fact, the Colombian draft contract contained a clause stipulating that its terms were not to be made the occasion of forcible intervention. And yet it was withdrawn. If the "new" Munroe doctrine is to cover all supply of foreign capital to Central and South America, it has no element of justification. Had it been a declaration that financial obligations involving liability to invasion and control ought not to be incurred by American States towards European ones, it would have borne some analogy to Monroe's original declaration. As it is, it bears none. It is a simple assertion of the policy of the dog in the manger. "The declaration of Mr. Monroe," says Frelinghuysen, the United States Secretary of State, in 1882, "is not the inhospitable principle which it is sometimes charged with being, and which asserts that European nations shall not retain dominions on this hemisphere, and that none but Republican governments shall here be tolerated." All that Frelinghuysen asserts for it is that it at least opposes any intervention by European nations in the political affairs of American republics. This is very different from refusing them a right of business intercourse with America. It would even be consistent with a right of annexation by a European Power in pursuance of a *boná fide* claim of redress. It only precludes gratuitous political meddling. Much the same position is taken up by Woolsey. "To lay down the principle that the acquisition of territory on this continent, by any European Power cannot be allowed by the United States, would go far beyond any measures dictated by the system of the balance of power,

for the rule of self-preservation is not applicable in our case; we fear no neighbours. To lay down the principle that no political system unlike our own . . . . . can be endured in the Americas, would be a step in advance of the congresses at Laybach and Verona, for they apprehended destruction to their political fabrics, and we do not." And he limits the Monroe doctrine to the "wise and just opposition to interference" which consists in the resistance of attempts by European Powers to alter American constitutions. That is a thing—the support of established governments against subversion—which it can never be wrong for a State to undertake. "Anything beyond this justifies the system which absolute governments have initiated for the suppression of revolution by main force." (*Int. Law*, sect. 47.)

It will be seen that American authorities of the highest diplomatic and academic rank accordingly concur in seeing in the Monroe doctrine nothing but an assertion of the undoubted right of any government to protect its neighbours against revolutionary force. When, in 1899, a United States diplomatist referred in Nicaragua to "Mr. Monroe's doctrine respecting the colonisation of any part of the American continent by a European Power," the Secretary of State (Clayton) told the British minister that the Administration "in no way adopted that doctrine." (*State Papers*, Vol. 40, p. 961.) Indeed, Mr. Reddaway, in his excellent monograph, "The Monroe Doctrine," finds it, in its modern shape, less like a "Monroe Doctrine" than an "Adams' sentiment." Quincy Adams was its real progenitor. But even in Adams' view it rested solely on the right to protect friendly Powers against gratuitous interference. "The United States, having acknowledged the independence of the trans-Atlantic territories, had a *right* to object to the interference of foreign Powers in the affairs of those territories." Great Britain, not having

then (1823) recognised them as independent, had no such distinct *right.*

President Wilson's further declaration against the establishment of any government in America which does not fulfil the Lincolnian canon of being "of the people, by the people, for the people," reads oddly. At a time when it is seriously questioned by political thinkers whether representative institutions and party government really do result in self-government, and whether they do not issue in the domination of hereditary cliques, it is scarcely wise to insist on the free and sacred character of parliamentary constitutions. When it is Central American parliamentary constitutions which are thus solemnly approved as superior to anything else that can be devised—so superior as to be maintained by strangers by force of arms—the declaration borders on burlesque. On the whole subject, German scholars may be referred to Kraus' *Die Monroedoktrin* (Berlin, 1913), and to an article in the *Edinburgh Review*, January. 1914.

Mexico.

It would nevertheless be wrong to refuse a warm tribute to the absolutely correct and impressive conduct of the American Administration in face of the Mexican problem. President Wilson and Mr. Bryan have not been moved a hair-breadth by the clamour of interested and disinterested advisers who have urged them on to intervention. Just as the Italian adventure in Tripoli was one of the most discouraging events of recent years to those who hope to see a reign of settled law in the world, so the attitude of America towards Mexico is one of the most hopeful. Acts speak louder than words, and while the Administration exhibits such force of character and intellect in its conduct, nothing but friendly criticism need be expended on its speeches.

The Hague Private Law Conferences.

The question, to which we briefly referred last November (in reporting the results of the Madrid Conference of the International Law Association), of the participation of the United States and Great Britain in the Hague Private Law Congresses, merits a further word. It will be remembered that Mr. A. K. Kuhn, of New York, read a paper in which he forcibly urged the desirability of the English-speaking nations entering into an arrangement which has worked well on the Continent, and that with this view, they ought to be represented at future Congresses. In justice to Mr. Kuhn, it ought to be added that he by no means thinks that these nations would necessarily be well advised to enter into the Conventions as they stand. That would involve the abandonment of their theory of domicile as the major criterion of the personal statute, and this he does not advocate. But, participation in the Conference, American and British lawyers would have an opportunity of demonstrating to their Continental colleagues what our conception of domicile really is, and how nearly it approaches the conception put forward by Asser of a "private-law nationality." The competing criteria of nationality and domicile would be brought very near the fusing point. Such a fusion would remedy a serious divergence which has only existed in an acute form for some sixty years. It would not be difficult of accomplishment, and it would constitute a real contribution to the general welfare of all who have international relations. At present, Continental jurists have the greatest difficulty in appreciating the permanence of the tie of domicile, and the difficulty which exists in casting it off. They cannot imagine that it means more than the French *domicile*, which is little more than officially recognised residence. Formal and official interchange of views at a diplomatic conference would almost certainly pave the way for a better understanding.

Real Estate Abroad.

In *Smith* v. *Smith* ([1913], 2 Ch. 217), the true position of a testator who leaves immovable property situate abroad appears to have been imperfectly appreciated. Foreign land is not "real property," and to apply to it the rules which place real property in a peculiar position in administration is a mistake. Yet, in *Smith* v. *Smith*, a testamentary charge of legacies on a fund of land and chattels situate in Argentina was held not to put the land and chattels on equal terms, but to make the land an auxiliary fund only. As regarded the Argentine chattels specifically bequeathed subject to the charge, it was held that they were applicable on an equal footing with the general residuary personalty.

This case raises questions of pure English law, which can only be lightly touched upon here. There was an express charge, which dispenses us from consideration of the rule laid down in *Greville* v. *Browne* (7 H. L. C. 589)—against Lord Wensleydale's opinion—that where there is a gift of a mixed fund and a gift of legacies, the latter are charged on the real, as well as on the personal, part of the mixed fund. The Lords laid down the rule as though it applied only in cases in which the testator first gives legacies and then makes an immediate gift of the residue of his real and personal estate. But Lord Wensleydale states the principle adopted by the House to be that—"wherever realty and personalty are united together in one fund, they are both made subject to the legacies given by the will." It is true that *Jarman* (II, 2002) says that this alone is not sufficient, and that in every case "something more" has existed as an indication of charge, quoting Lord Abinger (in *Nyssen* v. *Gretton*, 2 Y. & C. 232). But the "something more" may be a very little more—and how much it is! In the present case of *Smith* v. *Smith*, however, the gift was expressly made

subject to the legacies, so that the charge clearly existed. But was it a charge on the land and chattels alike, or primarily on the chattels? It would seem that there should have been little room for doubt. Argentine land, it is submitted, is personal estate. The various categories of the mixed gift ought, therefore, to have been applied on a footing of entire equality. This course was not taken. Treating the Argentine land as real estate, Mr. Justice Eve was faced with the problem of *Roberts* v. *Walter* (1 R. & M. 752). It became necessary to decide the priorities as between the land and the chattels. Jessel had, in *Gainsford* v. *Dunn* (L. R., 17 Eq. 405), taken the view that the fund so blended was to be treated as a homogeneous whole, but it was now held that this view had been exploded in 1880 by *Elliott* v. *Dearsley* (16 Ch. 322). The land and chattels were charged; but, unless the testator has *expressly* directed that the legacies are to be satisfied out of their proceeds, thus specifically treating them as a mixed fund (which, of course, in these cases he does not), the land will only be an auxiliary fund.

It was therefore held that the residuary personalty was exonerated, as between itself and the chattel portion of the Argentine property. Had the Argentine land (as we think it should have) been held to be personalty, it would have come under the same rule. The reasoning by which Mr. Justice Eve supports the treatment of foreign land as on a footing with English land does not carry conviction. The executors, his Lordship says, are bound by the very terms of their appointment to pay the debts out of the deceased's personalty irrespective of his desires: there is no such obligation to pay them out of realty. But this begs the question. What is personalty? In *North* v. *Robinson* (2 Ventr. 358) it was expressly said that foreign land—"is looked upon as a chattel to pay debts and a testamentary thing." And it is considered as pure personalty for the purposes of

the Mortmain Act. (*Beaumont* v. *Oliveira* [1869], L. R., 4 Ch. 309). Any other conclusion will raise most difficult problems as to what rights in foreign land will be real and what personal property. The right of an owner of foreign land is not an estate holden of a lord paramount: it is an absolute ownership similar to the ownership of a chattel.

Foreign Judgments.

Three cases have recently been decided which have done something towards a further elucidation of the limits within which the English Courts will enforce a judgment passed in a foreign jurisdiction. These are, as is well known, not the same as those which they set to the exercise of their own jurisdiction. They have been restricted to the enforcement of final decrees for a liquidated amount in cases where the defendant was (*a*) domiciled in, (*b*) subject by allegiance to, or (*c*) resident in, the country of the judgment, or has elected to submit to its Courts. Dicey questions the adequacy of domicile as a ground, but on no very sure foundation: it seems to follow *à fortiori* from the admission of residence. But political allegiance, or subjection, is a good ground of jurisdiction; and a rather interesting point here arises as to the position of the Colonies. If the Court at Senegal or Saigon gives judgment against a Frenchman, the English Court will enforce it in England. Suppose it is a Sydney or a Singapore Court which passes the judgment against an Englishman, must it not, by a precise analogy, enforce that judgment here? One of the King's Courts has given judgment against one of the King's subjects, just as in the former case one of the French Courts has given judgment against a Frenchman.

The argument was not presented precisely on these lines to the Court in *G. Gibson & Co.* v. *Gibson* ([1913], 3 K. B.

App. The entirely untenable doctrine was set up that a native-born Victorian is, under some peculiar and special subjection to the jurisdiction of Victoria, so that a Victorian judgment is always to be recognised as valid against him, though an English or a Nova Scotian one would not. Put in this form, of course the contention failed. And the view, which seems to flow necessarily from the admission of allegiance as a ground of jurisdiction, that a decision of any of the King's Courts against any of the King's subjects may be enforced in England is productive of too startling practical consequences to be readily admitted. The conclusion must be that, when allegiance is recognised as a ground of jurisdiction, it is foreign allegiance only which is meant. And even so, it is a proposition that will require considerable qualification, as colonial systems develop. How would it be applied to the United States? The allegiance of the Philadelphian is to the United States, but is he therefore to be forced in England to implement a judgment passed in Arizona?

Of course, a judgment which is made in the face of "natural justice" will not be enforced here. *Robinson* v. *Farmer* (*ib*., p. 835) shows that the injustice must be something very gross and palpable. The Superior Court of Quebec had excluded evidence of fraudulent misrepresentation which the defendant tendered, holding that the representation ought to have been embodied in the written contract. Mr. Justice Channell considered that this did not amount to a denial of justice. It was, in fact, an attempt to make the law of England apply to Canada. The argument was gratuitously complicated by the allegation of fraud. Of course, if a judgment is obtained by a fraud on the Court, the English Court will not recognise it. But a judgment on a contract which itself was obtained by a fraud on a party is a totally different matter.

Judgments against Co-respondents.

The decision of Mr. Justice Scrutton (*Phillips* v. *Batho*, *ib*, 25) to the effect that if a divorce suit is properly pending in India, a co-respondent having no other present connection with that country, and ordered to pay damages, will be liable in England to an action for their recovery, must probably be placed on the basis of allegiance, though the judge strongly repudiates that ground. But it seems doubtful whether the award of damages in such a suit is a final and liquidated decree of such a kind as it is usual to permit to be the ground of an English action. Damages in such a case are now almost completely attracted into the orbit of the divorce system. They may be ordered to be settled; and that fact of itself is enough to show that they are not in the position of an ordinary liquidated claim. In *Henderson* v. *H.* ([1844], 6 Q. B. 288), a Newfoundland decree, ordering a sum to be paid in an equity suit, was enforced in England, but only because it simply ascertained a balance and ordered payment by defendant to plaintiff. Mr. Justice Scrutton was impressed by the supposition that if he did not entertain the action, the plaintiff would be remediless, since he could not sue the co-respondent in England. But here again there is a *petitio principii*. Why should not a foreign husband sue a tort-feasor here? The act complained of was unlawful in India: it would have been unlawful here. And the Act of 1857, sect. 33, leaves it perfectly open to the injured party to bring his petition for damages here.

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We have already commented on the serious character of an innovation which allows co-respondents to be brought from the ends of the earth to participate in divorce suits. In this particular case, the damages were assessed at the enormous sum of £7,200. We have pointed out that

President Evans, when he made the plunge of innovation in this (as in so many other matters),[1] did so in reliance on a Scottish case[2] where there was a clear ground of jurisdiction (on Scots principles) over the co-respondent. And we cannot affect to think the present state of the law satisfactory, or that it is improved by *Phillips* v. *Batho.*

Extradition.

The vexed question of the necessity of complying, on an application for extradition, with the terms of Extradition Treaties and of the Extradition Act, again arose in *Exp. Servini* ([1914], 1 K. B. 77). The Act of 1870 only comes into play on the conclusion of a Treaty and the consequent issue of an Order in Council. The Order may qualify the operation of the Act. On an application for the extradition of Servini, no proof was offered of any such Order having been issued with regard to his country (Italy) or of its qualifications (if any). Mr. Justice Bailhache regarded this as a fatal defect: "When a fact in a criminal case requires to be proved, and it is not proved, it is no answer to say that if it had been thought of, it could easily have been proved." But Justices Ridley and Scrutton assured his Lordship that it was not usual to grant a writ of *habeas corpus* in a case of mere irregularity. If they are right, it will be of little use complaining of minor irregularities in extradition in future. Mr. Justice Scrutton thought that the Order should have been proved, but declined to set at liberty a person against whom there was a substantial *primâ facie* case. This course has been taken in English criminal cases; and one can see why. The King's Bench, having authority to commit a criminal for trial, naturally committed the person brought before

[1] *Rayment* v. *R.* ([1910], P. 271). Cf. *L. M. & R.*, Vol. 36, p. 212.
[2] *Fraser*, 8 M. 400.

them on *habeas corpus*, if he was found to be (however irregularly) in custody on a *bonâ fide* charge. But they have no such Common-law power to extradite: and, consequently, Mr. Justice Scrutton's opinion appears to be clearly fallacious. Mr. Justice Ridley found it "undesirable" to discharge a prisoner on a technicality. But neither is that a sufficient argument.

TH. B.

VII.—NOTES ON RECENT CASES (ENGLISH).

THE considered judgment of Pickford, J., in *United States Steel Products Co.* v. *Great Western Railway* (L. R. [1913], 3 K. B. 357), deals with a difficult commercial point on which it seems that no question had previously arisen. Goods sent from America on *c.i.f.* terms to a consignee in England, had been stopped *in transitu*, after being handed to the defendants, who received the consignment on a condition, which seems to be a common form, having a clause giving to them not only a particular lien for all their carriage and other charges on the goods, but a "general lien for any other moneys due to them from the owners of such goods upon any account." As a large sum was owing by the consignee to the defendants for other matters, they claimed to hold the goods until this was satisfied. The plaintiffs, who were quite unaware of the existence of such a debt, paid it, and brought this action to determine the right to the money. Pickford, J., reads the clause as entitling the defendants to withhold the goods from the consignee until their claims against him are satisfied, but not under the circumstances as giving them a lien against the plaintiff who had paid all charges on the goods in question. This is equitable, for it is against justice that the defendants should relieve themselves

from the effect of their want of care in collecting their debts, and affix the consequences on another person. He therefore gave judgment in favour of the plaintiffs. This reading of the clause is, however, a somewhat restricted interpretation.

Even if there had been no precedent on which the decision in *National Provincial Bank of England* v. *Glanusk* (L. R. [1913], 3 K. B. 355) could have been founded, and first principles had had to be applied, the judgment could hardly have been different. A man who guarantees up to a precise sum an overdraft allowed by a bank to a customer, must be presumed to contemplate the possibility of having to meet his undertaking. And no bank which, as a matter of favour, lends money to a customer would undertake the dangerous obligation of communicating to the guarantor suspicions which might arise in their minds that their debtor was not dealing with his account in a manner which was fair to the guarantor, for a mistake in their suspicions might lead to disastrous consequences to themselves. But independent of this, there is no duty on a bank to interpose in a transaction of this description. The contract which they have entered into is not one *uberrimæ fidei*.

The plaintiffs in *Kacianoff* v. *China Traders Insurance Co.* (L. R. [1913], 3 K. B. 407) were placed in a curiously difficult position under their insurance contract. Their ship, intended to carry provisions from America to a Russian port, was insured against total (not partial) loss by war risks only. When she was nearly loaded, the underwriters notified that, as the port of destination was then blockaded by the Japanese fleet, they would, if the ship were sent thither, set up that any loss that might follow was deliberately caused by the plaintiffs; and the underwriters refused likewise to allow, as not being within the contract, for any

loss on the cargo if it were sent to a neutral port. Apparently, as a sort of despairing remedy, the plaintiffs sued for a constructive total loss, but it was reasonably held that there could not be a constructive total loss by a war risk when ship and enemy were hundreds of miles apart.

The definition of civil commotion given in *London and Manchester Plate Glass Insurance Co.* v. *Heath* (L. R. [1913], 3 K. B. 411), though it supplements Lord Mansfield's limited explanation in *Langdale* v. *Mears*, halts, by express admission of the Court, short of completeness. Its most important enlargement seems to be that there must be turbulence, and therefore the aggressors must work their mischief, not singly at some slight distance from one another, but by two or more acting together, and that they must have an intention to commit assault. It must, Hamilton, L.J., holds, at least involve that the acts should be done by the agents in company, and not merely in preconcert, simultaneously, and in proximity to one another. Under this ruling and the circumstances of the case, the plaintiffs by the terms of their policy had no claim for damage to their property "caused directly by or arising from civil commotion"; for the civil commotion, if there had been any, would have arisen out of the damage, and not the damage out of the commotion. If, however, the ladies, who in pursuit of the franchise broke the windows which were the basis of this claim, had with outcries rushed from their place of assembly brandishing hammers and prepared for resistance, and then had begun their planned destruction in company, it would apparently have been civil commotion, and the plaintiffs might have recovered. But if, on the other hand, acting as they did here, apart and without clamour, a tumult had afterwards arisen from contending efforts at arrest and rescue, the policy would have afforded no protection.

Brett, L.J., said, over twenty years ago, in *Clark* v. *Brown* (2 Q. B. 724), that if a man "means to deny the legality of a contract he has entered into he must say so in plain terms." This seems to be a reasonable interpretation of Rule 15 of Order XIX, which requires either party to raise by his pleadings all grounds which show that the transaction is void or voidable, either by Statute or Common law. And it was not only reasonable but requisite that a declaration so definitely made on such authority should be incorporated in the practice books. But the decision in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (L. R. [1913], 3 K. B. 422) much modifies it. Farwell, L.J., holds that as facts, and not law or evidence, have to be pleaded, it follows that where a contract sued on is, on its face, illegal, the Court must take notice of the illegality, whether this has been pleaded or not, but when illegality is not shown on the face of the document itself, then the facts must be pleaded. This is no doubt right. But generally, it would be prudent not to omit the plea, for even the Court may not be unanimous on the point of illegality. In this case, for example, Kennedy, L.J., was of opinion that the contract in question was not illegal.

T. J. B.

We have long known on high authority that "the law is a hass." The decision in *Hewson* v. *Shelley* (L. R. [1913], 2 Ch. 384) would seem to show that it is also a rogue. There it was held that, when letters of administration are granted by the Court under the impression that the deceased died intestate, when, in fact, he left a will, such grant is void *ab initio;* and accordingly, property sold by the administrator can be recovered from a *bonâ fide* purchaser by the executors as soon as the will is discovered. In other words, the law having represented to the purchaser that the administrator was entitled to sell the

deceased's property, afterwards, when the purchaser has paid his money, repudiates its own representation, and orders the purchaser to give back the property. So Astbury, J., decided, following English authorities, and disapproving Irish authorities to the contrary.

How much the late Lord Macnaghten did by his clear and well-considered judgments to simplify and rationalise the law is shown by frequent decisions following them. The latest of these is *Davis* v. *Marrable* (L. R. [1913], 2 Ch. 421). In *Colls* v. *Home and Colonial Stores* (L. R. [1904], A. C. 179), his Lordship pointed out that the right to light was merely a right to prevent your neighbour erecting something on his land which would be in the nature of a nuisance to your house by rendering it less fit for ordinary use. Accordingly, all questions as to whether the light received came, after the neighbour's works were erected, from precisely the same spot in the heavens as it did before they were erected, were, as Joyce, J., in *Davis* v. *Marrable* (*supra*), points out, henceforth irrelevant. The sole question now is, have your neighbour's works so diminished or otherwise altered the access of light to your windows as to render your house less habitable or useful? If not, there is no cause of action.

A trust of pure personalty can be declared without writing and a trust of land without a deed, and the declaration need in neither case be communicated to any living person, and still it may be binding on the settlor and on the property included in it. But informal declarations are regarded by the Courts with suspicion, especially when they are kept secret, and more especially still when they operate to prefer one creditor of the settlor over the others. Both these grounds of suspicion arose in the case of *In re Cozens, Green* v. *Brisley* (L. R. [1913], 2 Ch. 478); and so it is not strange that, even saying the scribbled notes, which were

the only declaration of trust, were sufficient to satisfy the Statute of Frauds. Neville, J., held there was no sufficient evidence of any present and irrevocable intention on the part of the writer to constitute himself a trustee of the property to which the notes referred.

It does not say much for the care with which legal instruments are drawn that two cases are reported in the last three months' Law Reports where words of limitation have been omitted or misused with, in both cases, the almost certain result of defeating the settlors' intentions. In *In re Dawson's Settlement* (L. R. [1913], 2 Ch. 498), a remainder under a settlement was in certain events given to the "heir-at-law" of the settlor. Now heir-at-law is not a word of limitation at all, but merely describes a particular person. Accordingly it was held that, in the absence of sufficient evidence to establish a case for rectifying the settlement, all that went to him was a life estate. In *In re Monckton's Settlement, Monckton* v. *Monckton* (L. R. [1913], 2 Ch. 636), realty and personalty were conveyed to a trustee without words of limitation at all. Here, of course, so far as the realty was concerned, the trustee could take no more than a life estate in the realty, and so his *cestuis que trust* could get nothing more than the equitable estate in that. In the personalty, no words of limitation being necessary, an absolute interest passed both to the trustee and the *cestuis que trust*.

In *In re Monckton's Settlement (supra)* the personalty was held on trust as capital money under the Settled Land Acts, and Sargant, J., held that sect. 22 (5) of the Settled Land Act 1882 did not prevent the absolute interest in this passing to the trustee without words of limitation. His lordship said that where property was held on a trust for conversion, the equitable interest in it might be dealt with either as

what it actually was or what it was to be converted into, and consequently, whether it was money to be invested in land or land to be changed into money, the absolute interest in it could be disposed of without words of limitation. (*See* p. 647.)

In *Teofani & Co., Limited* v. *A. Teofani* (L. R. [1913], 2 Ch. 545), the defendant, happening to bear the same surname as was borne by the plaintiffs' cigarettes, gaily started on a capital in hand of £55, of which £20 was borrowed, to manufacture "Teofani's Cigarettes." The plaintiffs, who had been manufacturing and selling cigarettes for many years under this name, which they had registered as a trade mark, did not like this, and requested him to cease so describing his cigarettes. He refused on what, *primâ facie*, seems a reasonable ground, namely, that the cigarettes which he made and sold were his cigarettes, and his surname was Teofani. The plaintiffs applied for an injunction to compel him to adopt some design to show that his Teofani's Cigarettes were not their Teofani's Cigarettes, and the Court below granted this and the Court of Appeal affirmed the grant. As Swinfen Eady, L.J., pungently said (p. 566), it would be an entirely new thing to hold that the Court would not restrain a fraud because it consisted in the fraudulent use of the defendant's own name.

The legal meaning of "children" is *legitimate* children. Probably few principles have inflicted more injustice than this one, or have done more to defeat the intention of testators. The latest case is *In re Pearce, Alliance Assurance Coy.* v. *Francis* (L. R. [1913], 2 Ch. 674). There the brother of the testatrix was reputed to be, but in fact was not, married to a lady, A., by whom he had six children. The testatrix was friendly to A., and devoted to the children. A. died, and four years later the brother of the testatrix married B., and before his death had two children

by her. The testatrix left the residue of her estate in trust for her brother's "children." B.'s two children took it all, and A.'s six obtained nothing.

It would be well to note the following decisions. An executor who is surety for a debt of his testator cannot retain in respect of the debt unless he has actually paid it (*In re Beavan, Davies, Banks & Co.* v. *Beavan*, L. R. [1913], 2 Ch. 595). Under sect. 3 of the Judicial Trustees Act 1896, the Court has power to relieve a trustee who has improperly paid away trust funds on a mistaken interpretation of the trust instrument (*In re Allsop, Whittaker* v. *Bamford*, L. R. [1914], 1 Ch. 1). The Court has power, under sect. 36 of the Settled Land Act 1882, to order the costs of an action, in respect of the settled land bought by the tenant for life, to be paid out of capital, even after the abandonment of the action (*In re Wilkie's Settlement*, L. R. [1914], 1 Ch. 77). And a corporate body can, under sect. 4 of the Public Trustee Act 1906, be appointed a custodian trustee of a charitable trust (*In re Cherry's Trust*, L. R. [1914], 1 Ch. 83).

J. A. S.

SCOTCH CASES.

There have been two outstanding decisions of recent date as to the respective duties of drivers of vehicles at the intersection of main and cross roads, namely, the widely known case of *Macandrew* v. *Tillard* ([1909], S. C. 78), and the complementary case of *Robertson* v. *Wilson* ([1912], S. C. 1276). The result of these has lately been so admirably summed up by Sheriff Substitute Lee, that we quote his words,—"The vehicles on each road must approach the crossing with caution and take all reasonable care for the safety of traffic on the other, and I think it would be a dangerous doctrine to lay down that this duty lies in

a higher degree on the one vehicle than on the other, but there is a real and a very definite distinction in the matter of right. The vehicle on the main road is in possession, while the vehicle coming on to it from the side road is in the position of one who must wait his opportunity to cut in without displacing those already in possession. Accordingly, if two vehicles approach the crossing together, and one or other must give way to avoid collision, the right to proceed is with the vehicle on the main road. If the driver on the main road has approached the crossing with proper caution, and given reasonable opportunity to any driver on the side road to be aware of his approach, he is then entitled to proceed to take the crossing in the belief that this other driver can and will protect himself from a known danger." (*Waverley Iron and Steel Co.* v. *J. Taylor Ltd.* [1913], 2 S. L. T. 257.)

The case of *Corbidge* v. *Somerville* ([1913], 2 S. L. T. 325), already referred to here when reported on the relevancy, has now been decided on evidence. The Court found at the preliminary hearing that a trustee in bankruptcy in England had a title to reduce, on the plea of no jurisdiction for lack of domicile, a decree of divorce obtained against the bankrupt in Scotland in an action not defended by him nor intimated to, nor defended by, his trustee. Now, as a result of the proof, decree of reduction has been granted. An interesting part of the Lord Ordinary's (Lord Hunter's) opinion is where he refers to the effect of declarations made by the husband in legal documents that he was a domiciled Scotsman. We should not be surprised if not a few of our readers, like ourselves, have had no very clear view as to the value of such declarations. This is what Lord Hunter said,—" Now, in certain cases, as for example, in cases of double residence and a separation of interests between one country and another, such declarations may be of

some importance. In other cases, declarations as to domicile may be of no importance." A man cannot change his domicile merely by a declaration. If he is born in and lives all his life in Scotland, he cannot make himself domiciled in England by declaring that country to be the place of his domicile. *E converso*, if he migrates to England and settles in it *animo manendi*, he cannot retain his Scottish domicile contrary to the facts of his life, by declaring himself still domiciled in Scotland. His declaration in such circumstances is merely a defiance of the legal rule as to domicile, under which settlement in a foreign country *animo manendi* involves the acquisition of a domicile there, although the person in question may either know nothing about the legal conception of domicile or, if he does, may desire, contrary to law, to avert the consequences of his actings. It is true that a man can only change his domicile *animo et facto*, but as I understand the law of the matter, the *factum* is residence in the new country, and the *animus* is the *animus manendi*, that is to say, residence there without any *animus revertendi*."

Is it slanderous to say of a person that on one occasion he had been drunk? It would be to say that he was addicted to drink. In *Tait* v. *Morrison* ([1913], 2 S. L. T. 235), the words complained of were, that pursuer, an Inspector of Poor, "was so drunk on Coldingham Common that he lost himself and the party he was shooting with, and joined another party." These words the pursuer innuendoed as inferring that "pursuer was addicted to excessive indulgence in drink and was in consequence unfit to occupy a public position." An issue with that innuendo was allowed, and the case sent to a jury.

As to the position in a liquidation of the holder of shares for which cash has not been paid, Buckley in his work on Companies[1] says: "A *bonâ fide* purchaser and transferee,

or even allottee, of shares which the company by the share certificate state to be paid, who has no notice that the shares are not what they are certified to be, is not liable, although the shares have not in fact been paid." Examples of that principle being applied to allottees are *Parbury* ([1896], 1 Ch. 100) and *Bloomenthal* ([1897], A. C. 156). In the latter case, the decision of the Court of Appeal was against the allottee, on the ground that, as they held, he had not adequate ground for believing the shares to be fully paid, although he did so believe. The allottee, Bloomenthal, had been induced to lend money to a company on the faith of a security to be given him in the form of fully paid-up shares in it. The shares were allotted to him as fully paid up, but in fact they were not. The decision of the Court of Appeal was against Bloomenthal, on the ground that while he believed the shares were fully paid up, he was not justified in that belief. Their decision was, however, reversed by the House of Lords, where the plea of estoppel against the company was sustained, and Bloomenthal was held not liable to pay anything on the shares. Now we have in *Penang Foundry Co.* ([1913], 51 S. L. R. 3), an application of the same rule in the Scottish Courts. An allottee had not paid cash for his shares, though the certificates issued to him bore, that the shares were fully paid. The liquidators sought to make him a contributory. Lord Cullen, after proof, found that the shareholder was justified in believing that the shares were fully paid, and held that the company were barred from insisting in their claim by reason of their representation in the certificates. In reference to the argument for the liquidator, that the principle of the other cases mentioned could not apply to the case of an allottee, his Lordship said: "The principle of bar or estoppel is a general one of the Common law, and in this connection cannot be limited to transferees of shares unless the conditions of its application are only possible in the

case of transferees. But this, in my opinion, is not sound. It is true that an allottee will not often be in a position of not knowing the footing on which shares which he accepts have been allotted to him. But he may be, and if in such circumstances he accepts shares in reliance on the company's representation that they are fully paid up, and without notice to the contrary, he is, I think, as much entitled to hold the company to that representation as a transferee acquiring right from him without notice would be." D. M.

IRISH CASES.

It may be only a rough working rule that "where one of two innocent parties must suffer by the fraud of a third, he should suffer whose conduct has facilitated the commission of the fraud." Still, there are occasions where no other rule is applicable, and of these *Ambrose's Estate* ([1913], 1 Ir. R. 506) is an example. In 1897, A. mortgaged certain lands to P. to secure £600. In 1905, some of the property which was the subject of this mortgage having disappeared, and an additional sum having been advanced, A. made a fresh mortgage to P., which included other lands, to secure £917. This mortgage did not recite the previous one or in any way refer to it. In 1907, P. transferred the new mortgage to himself and H., under circumstances which made them transferees for value; H. had no notice of the old mortgage; A., the mortgagor, acted as solicitor for P. in the matter of the transfer, and approved of the transfer deed. It had been alleged by P., at the time when the new mortgage of 1905 was made, that the old mortgage-deed of 1897 was lost, and so A. had not taken any steps to have it delivered up to him. As a matter of fact it remained in P.'s possession, and in 1908 P. fraudulently transferred this old mortgage to a bank to secure a

debt of his own: the bank subsequently proceeded to realise it in the Chancery Division. In 1912, P. and H. transferred the new mortgage to H. and M., and they now proceeded against A., claiming an order for the sale of the lands subject to this mortgage, and alleging that the full sum of £917 was due. A. claimed credit for the sum of £600 which had been realised by the bank under the old mortgage. Ross, J., held, on the ground stated at the beginning of this note, and on the general principles of estoppel by negligence, that A. could not sustain this contention. "I am of opinion that in consequence of his leaving the old mortgage outstanding in the hands of P., it is not open to A. to say that the whole amount is not due."

Is a transaction "harsh and unconscionable," within the meaning of sect. 1 of the Money-lenders Act 1900, merely by reason of the excessive rate of interest charged, there being no allegation of any other unfair dealing, or of misconception of the contract on the part of the borrower? *Thomas* v. *Ashbrook* ([1913], 2 Ir. R. 416) answers this question in the affirmative, with slight qualifications. "The Act prescribes two conditions to revision: the rate of interest must be excessive, and the transaction must be harsh and unconscionable—both questions of fact to be determined on the particular circumstances of each case. Mere excess, standing alone, gives no right to re-open, but it may be such as to render the transaction unconscionable." It will be such if it is grossly excessive as compared with the risk, having regard to the facts as to the financial position of the borrower which are known to the lender, or would have been known to him if he had made proper inquiries. The risk and all the circumstances have to be considered; and "the Court has to undertake the novel and trying *rôle* of a hypothetical, reasonable, and fair money-lender."

National Bank v. *Behan* ([1913], 1 Ir. R. 512) is a rather curious case: the Court would have felt itself unable to set aside a voluntary settlement impeached as being intended to defeat creditors (within the meaning of 13 Eliz., c. 5), but did set aside the same settlement as being void against a subsequent purchaser for value (under 27 Eliz., c. 4). This result was arrived at in consequence of the Court's view as to the differing onus of proof under the two statutes. If it is a subsequent purchaser who impeaches the conveyance, and the conveyance is voluntary, it can only be protected under the Voluntary Conveyances Act 1893; to bring it within this Act, it must be shown to have been made *bonâ fide* and without fraudulent intent; and it is the party seeking to uphold the conveyance who must show this, if he can. On the other hand, when the conveyance is impeached as being in fraud of creditors, the onus is on the party impeaching it to show that it was fraudulent in its conception or execution.

In *Croker's Estate* ([1913], 1 Ir. R. 522), Wylie, J., again considers very fully the question as to whether the interest in lands sold by a landlord, under the Irish Land Act 1903, is converted as from the date of the purchase-agreements, assuming that the sale is carried out. The general assumption had been that such a sale did work a conversion as from that date. Some doubt had been cast on that assumption by the Chief Baron's discussion (given *obiter*, no doubt) in *Steele* v. *Steele* ([1913], 1 Ir. R. 292), referred to in a previous number of the *Law Magazine*. Wylie, J., in a considered judgment has now gone into the matter again, and adheres to his previous decision, notwithstanding the Chief Baron's doubts—which, as the learned Judge remarks, are opposed to "the law and practice prevailing in this Court for the past twenty years, in accordance with which many thousands of pounds have been paid out from time to time."

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Great Jurists of the World. Edited by Sir JOHN MACDONELL, C.B., LL.D., and EDWARD MANSON. London: John Murray. 1913.

This work is the amalgamation of a series of articles written by various authors for *The Journal of Comparative Legislation.* It is obvious from the list of writers that each life is the work of a master hand, and few will be found to cavil at any of the subjects chosen for biography. As would be expected, the work of tracing the growth of early Roman law is excellently done by Mr. Ledlie, who so well translated the *Institutes* by Rudolph Sohm from the original German. English law is well represented by such names as Francis Bacon, John Selden, Hobbes, Lord Stowell, and Bentham. We will not recount the other names geographically, as they belong to the legal community of the world. We must congratulate the learned Editors upon their discrimination in the department of Roman-Dutch law. In the life of Hugo Grotius, by the late Sir William Rattigan, we have the history of a wonderful man, many-sided, and of world-wide fame. We find some slight errors and omissions, caused, perhaps, by unfamiliarity with the Dutch language. We find no mention of his *Introduction to the Jurisprudence of Holland, De Inleiding tot de Hollandsche Rechtsgeleerdheid.* After the famous *De jure Belli ac Pacis* this is perhaps the best-known of his writings. It was written between 1618 and 1621, whilst in prison at Louvenstein, and the opinion Grotius himself had of it is evidenced by the letter he wrote to his children (see *Rechtsgeleerde Observatien*, Vol. I, p. 9): "In its composition I have been careful to deal with the whole subject in proper order, and I hope I have succeeded as well as Justinian in his *Institutes.*" Published in 1631, it has been used as authoritative wherever Roman-Dutch law has flourished. We find no mention either of the *Opinions of Grotius* with notes by Schorer. Names are wrongly given, Carnet for Cornets, and Barneveldt for Oldenbarneveld, to mention two only. Still, with few exceptions, admirers will have little fault to find with the life of this legal giant among men. The criticism of the work of Cornelius

van Bynkershoek (1673—1743), written by Mr. Coleman Phillipson, strikes us as being excellent. Another life which appeals to the imagination of the Roman-Dutch lawyer is that of Cujacius or Cujas (1522—1590), written by Mr. Coleman Phillipson. Without the writings of Cujas and Doneau, his pupil, there is much in the Commentaries of the great Voet which would be almost incomprehensible. We make no apology for thus bringing into prominence the Roman-Dutch law writers, as that was the system of law which served as a framework for most Continental law. Room has been rightly found for that wonderful writer during the reign of Louis XV, Robert Pothier. Nurtured in law, his mind turned naturally in that direction, as has been well brought out by Mr. de Montmorency. Other great names appear, such as the colossal von Savigny, and Pufendorf, but it is impossible to refer to all of them. We are informed by the publishers that the life of de Vattel, ascribed to Mr. Phillipson, should in reality be credited to Mr. de Montmorency. Of course it is easy to find fault with the inclusion or exclusion of names, but we must confess surprise at the omission of Johannes Voet (1647—1713), but perhaps the learned Editors were of opinion that, as his work ran on such parallel lines as that of Grotius, it was unnecessary to include both. We can only say in conclusion that anyone who claims to be a student of the whole science of law should on no account miss reading this valuable and interesting work.

Higher Nationality: A Study in Law and Ethics. By Viscount HALDANE OF CLOAN. London: John Murray. 1913.

This little book contains an address delivered before the American Bar Association at Montreal, in September last, by the Lord Chancellor of Great Britain. Anything coming from that source is entitled to the greatest possible respect, but it would seem as if the address was composed of principles which are very old friends appearing in new garments. Lord Haldane elaborates two truisms: (1) That lawyers in the past have always influenced the development of law; (2) That beyond the strict law, as such, there exist certain universal maxims which govern the conduct of individuals and nations. In arguing out the first, we have presented to us a complete answer to the modern contention, that there are too many lawyers in Parliament. The second is merely the modern application to modern conditions of the old Roman lore *de jure naturali*

et gentium et civili, so learnedly argued in the *Institutes* and *Pandects* of Justinian, and further by Hugo Grotius in his writings on Private and Public law. Lord Haldane goes to the German for a word to describe this set of maxims, and makes use of the word "Sittlichkeit" or the system of habitual or customary conduct. The address is of considerable value for once more setting forth rules and principles too often forgotten or ignored by a generation rather prone to slipshod and pseudo-humanitarian thought.

The Upas Tree. By ROBERT MCMURDY. Illustrations by WILLIAM OTTENAN. London: B. F. Stevens & Brown.

The main *motif* of this book is the advocacy of the abolition of capital punishment in the United States. A secondary purpose is the reform of the judiciary. Neither of these, however, is obtruded upon the notice of the reader. The book is a novel in form and substance, and is only legal in the sense that it is written by a judge and a lawyer of high attainments. The hero, Beckwith Miller, is a rising young lawyer, who is arrested, tried, and convicted on circumstantial evidence of a complicated nature and who is sentenced to death. Under the very shadow of the gallows, within two minutes of the time fixed for his execution, proof of his innocence is brought. The real murderer has made a death-bed confession. The chief characters are finely drawn. In Colonel Sickles, a veteran practitioner and Miller's counsel at the trial, Judge McMurdy has created a character which will survive as the type of a high-minded and able American lawyer. Instances of the evils prevalent in the administration of justice introduced into the story are evidently founded on fact. Corruption of a jury appears to be an everyday occurrence in the States. "A juror," says Judge McMurdy, "may be bought for little more than thirty pieces of silver." At Miller's trial we find the public prosecutor, the district attorney, relying on a successful prosecution for his re-election to office, and the judge who tried the case relying on the district attorney's re-election for his reappointment as judge. The final chapter, entitled "Beckwith's Confession," consists wholly of Judge McMurdy's case against capital punishment. These arguments of an experienced and humane judge will command the attention of lawyers and laymen alike on both sides of the Atlantic.

The Judiciary and the People. By FREDERICK N. JUDSON. London: Humphrey Milford, Oxford University Press. 1913.

Of late years there has been a growing dissatisfaction with the administration of justice in the United States, and this dissatisfaction has become articulate. It is proclaimed in the popular press and on the political platform. It forms a subject for discussion at every meeting of the Bar associations. The people are beginning to lose, if they have not already lost, their confidence in the impartiality of the Courts of Justice. The causes for this distrust are here investigated and the remedies suggested. Chief amongst these causes are a rigid statutory procedure, archaic rules of evidence, limitation of judicial discretion, and popular election of the States' judges. "Unless" writes the learned author, "our judges are independent and protected against popular clamour and the demands of political changes, they cannot perform their duty to the people in the administration of justice for the people." In the examination of the power of the Courts to decide questions of Constitutional law he has employed the historical and comparative methods in such a way as to be invaluable to our law students here.

The Yearly Supreme Court Practice 1914. By M. MUIR MACKENZIE and T. WILLES CHITTY. London: Butterworth & Co.

This book, crowded with attested facts, will be welcomed to many a legal shelf. The well-known form and arrangement are of course both maintained, but the countless additions and amendments that must necessarily have been made can be discovered only by long and frequent use of the work. The Editor claims that "a special endeavour has been made to render the work of real use as a guide to the existing practice." There can be no doubt about the endeavour or the success of it. Although time has not sufficed to make more than a rapid examination of this volume, yet a more intimate experience of previous issues commands a ready and grateful acquiescence in the justness of the claim. But beyond this, an incursion here and there has disclosed some of the pains expended to give "practical directions as to the exact steps to be taken, and when and where and how each step should be taken." Cases reported even as late as September last have been included. The new Rules 22 to 31 of Order XVI have of course been noticed. But, as the Editor rightly says, as they "appear to require considerable modification and amendment, it may well be that a further postponement

may be necessary" before they come into operation, and therefore the notes on the old rules are still retained in the volume. Vol. 2, as well as Vol. 1, contains the complete Index. As each Index covers 365 pages, a good deal of space is thus occupied. But there are reasons, no doubt, which make convenience a compensation. No task can be more exacting than to prepare a work that shall be an instant guide to experts who often, in hurried perplexity, must accept and depend upon its pronouncements; and it is as near probability as possible that varied, numerous and minute as the materials are, the directions given in this work have never misguided.

The Annual Practice 1914. By J. B. MATTHEWS, K.C., R. WHITE, and F. A. STRINGER. London: Sweet & Maxwell.

Twelfth Edition. *The A. B. C. Guide to the Practice of the Supreme Court 1914.* By F. R. P. STRINGER. Sweet & Maxwell.

The great White Book seems to mature and consolidate its wisdom steadily with each volume. That is the only sign of antiquity about it; for in this issue it assimilates with the old knowledge all the fresh experience of the past year, and, by removing the obsolete, presents a compendium of current facts set out in the concisest form. Of subjects strictly new there are not more than usual. But one of them is the new rules to come into operation on the 1st January next, given at page 256, to secure preliminary investigation of legal claims of poor persons, and to provide professional assistance for the cause of action or defence. The assistance which is to be given by solicitor and counsel—whether on the "panel" or not—seems, as the Editor points out, to be, under Rules XXVI and XXVII, imperative on the professional persons who may be indicated by "the Court or Judge or proper officer." But a new feature in the book, if not a new subject, is that comprised under the head of Companies, at page 2182, where all the notes relating to debenture holders' actions, and to the alteration of the objects of a company, and the re-organisation or reduction of its capital under the Companies Clauses Consolidation Act, together with the forms and the new notes on the practice, have been, after revision, collected and re-arranged. This is a very judicious innovation. And another useful feature is that of having the "good form guide" of the Bar Council, not only restored to the book, but all its admonitions, including those of 1912, condensed and arranged under sections, so as to give facility for immediate reference. Another minor feature may perhaps also

be noticed, viz., the rule of computation of time appended to Order LXIV, which is a useful one to bear in mind. Where the present dimensions of the volume render further expansion almost prohibitive, the skill that has compressed into the brevity of a telegram the strictest accuracy of information, cannot fail to strike the consultant who acts upon the indications given.

Mr. Stringer's useful pocket volume is, in accordance with established moderation, issued without a Preface. But its value is so universally appreciated that a clarion note is not needed to herald its advent.

The Yearly County Court Practice 1914. By JUDGE WOODFALL and E. H. TINDAL ATKINSON. 2 Vols. London: Butterworth & Co.

In all the practice books issued year by year, so watchful is the attention given to every point which arises during their currency, requiring revision in the issue of the next year, that the closest scrutiny would probably fail to discover any omission even of slight importance. This alert care has been unflinchingly exercised in the present volumes; and though there is no radical change in its text, such as the measure now in its Bill form will require, yet new rules and an extension of the jurisdiction of the Courts have necessitated some considerable alterations. The work is so well known that comment upon its proved value would be superfluous.

The Law relating to Secret Commissions and Bribes. By ALBERT CREW. London: Sir Isaac Pitman & Sons. 1913.

It seems to be a growing practice in modern times for authors of books dealing with special subjects to print at the beginning a few lines on the subject, written by some great recognised authority. These few lines may have little or nothing to do with the book itself, and are dignified by the name "Introduction" or, as in the present case, "Foreword." The name of the great authority is printed large on the front page, and the unwary, not unnaturally, jump to the conclusion that he has something to do with the preparation of the text. Mr. Crew's book possesses quite sufficient merits without this artificial support. He deals with a subject which is of great importance, not to the commercial community alone, in a comprehensive and business-like manner. The text is divided into three Parts and an Introduction. In the last named we have an excellent

sketch of the relation of Principal and Agent. This forms a stable foundation upon which to erect Part I, which gives the Civil law relating to secret commissions and bribes; Part II, the Criminal law relating to secret commissions and bribes; and lastly, in Part III, we have treated the question of bribery of Public Officials. In Chapter XIX, which might more appropriately have been termed the Appendix, the reader finds the Statutes in several Colonies and the Isle of Man, relating to secret commissions and bribes, together with a Draft Bill which Mr. P. A. Silburn introduced into the Union of South Africa House of Assembly, and optimistically hopes to make the law. The Index, prepared by Mr. J. B. Welson, is not up to the standard set by the text, and is somewhat confused and confusing.

The Law of Contract in Scotland. By W. F. TROTTER, M.A., LL.M. Edinburgh and London: W. Hodge & Co. 1913.

Mr. Trotter is both a Scottish Advocate and an English Barrister, a fact which qualifies him for the task of contrasting the two systems of law. According to the Preface this appears to be the first book in Scottish legal literature dealing exclusively with general principles of contract. The text is divided into fourteen chapters, each one of which deals with an important branch of the subject. We do not feel ourselves qualified to pass an opinion upon the quality of the writing, but one thing does strike us as being excellent, and that is the scheme of arrangement. By its simplicity and completeness it makes for ease of reference. Mr. Trotter possesses an easy flowing style of diction, and has evidently expended much time and trouble in making his General Index a reliable key to the contents.

Forty years in the Old Bailey. By FREDERICK LAMB. London: Stevens & Sons. 1913.

Mr. Lamb, who has for forty years reported at the Central Criminal Court, gives here a summary of the proceedings and evidence and points of law and practice in a number of the cases which were tried during his long acquaintance with the Courts. They are all more fully dealt with in the Sessions Papers, but the present volume is intended to be a hand-book for the Bench and Bar. A great deal of useful information about cases is given, but we cannot think the arrangement a good one. So far as we can understand, the cases taken from trials during each Mayoralty are grouped

together in alphabetical order according to subject; so to find the cases on one point the reader has to hunt gradually through the book with the aid of rather a meagre Index. The cases are of very unequal authority, and we think some are absolutely valueless. For instance, what is the use of a report like this, "Upon Mr. Torr's opening, the Common Serjeant considered that the issue upon which the perjury was charged was an immaterial one, and directed a verdict of Not Guilty." The reports also want some editing. For instance, there are several cases dealing with the right of reply by the law officers, but there are no notes to the earlier cases referring to the later decisions, and it is only in a passage of Mr. Baron Huddleston's decision in *R.* v. *Walther and others* that we find that a rule on the matter had been made by a resolution of the judges, and even then we are not told of the date of the resolution, which was in December 1884. Neither are we told, in the case of *R.* v. *Simon*, that the very important ruling of Mr. Justice Wills was confirmed by the Court for Crown Cases Reserved.

Commentary on the Commercial Code of Japan. 3 Vols. By J. E. DE BECKER. London: Butterworth & Co. 1913.

Japanese specialists on law have, it seems, written exhaustively on the subject of the commercial code of their country, but as their treatises are printed in the Chinese character, and expressed in a language not yet extensively known in England, their labours have been hitherto barred from the knowledge of more than a very select few of our lawyers and merchants. But trade between Britain and Japan, considerable at present, will undoubtedly increase in the future. The learned and accomplished Author of these remarkable volumes has therefore afforded by them a valuable support to the relations between the two empires. He laments the difficulty of translating into English the technical terms of the original, but, assuming that he has been successful in overcoming the difficulty, his version is perfectly clear. And this is important, for the code, especially as it would seem as regards bills of exchange, is absolutely rigid; and therefore it is necessary for persons dealing with such instruments to be familiar with the rules governing them. Not less necessary to persons having business interests in Japan is an acquaintance with the law relating to Shipping and Bankruptcy, which forms the subject of the third volume.

Jahrbuch des Völkerrechts. By T. NIEMEYER and K. STRUPP. Leipzig: Duncker and Humblot. 1913.

There is only one remark to be made about this publication of 1,556 pages, "How did we ever get on without it?" It is an observation which, to our knowledge, has been uttered by more than one of the high priests of International law. As the Editors remark, the annual will be of use to the commercial world, to statesmen and officials, to historians and economists, as well as to diplomatists and lawyers. We shall content ourselves here with a brief indication of its contents. It consists of five main sections —Documents, Monographs, Polynational Treaties, Miscellaneous Essays, and Bibliography. The first-named contains not only the text of treaties, and other formal instruments, but, what is very valuable, much of the diplomatic correspondence leading up to them. A system of classification (Political, Commercial, &c.) is adopted, which is more or less arbitrary, but which may probably prove useful. The Monographs are first concerned with the important international events of the year 1911–12. In their production the novel principle has to some extent been followed of hearing both sides. Thus Sir T. Barclay presents on the whole the Turkish, and Rapisardi-Mirabelli, the Italian, side of the Tripoli war, while Fiore gives the Italian, and Scelle the French, version of the *Manouba* incident. We could wish the principle had been extended to the treatment of the Naval Prize Bill, which is somewhat *ex parte.* Prof. Niemeyer himself deals with the position of Morocco in 1911–12. The events of the year, dealt with from the standpoint of each separate nation, form the next series of monographs: the British section being excellently done by Mr. Norman Bentwich. It is very improperly entitled, "*England* mit *Neben*ländern'—and the winged words of Islay Herald rise unbidden to our lips! The Juridical Protest against the Tripoli War is here given prominence. The last series of monographs discusses the official and unofficial Congresses of 1912. Section IV is a tabular statement of the precise dates of adhesion to the various polynational Conventions. Section V consists of a set of short essays, of less immediate actuality than those included in Section II; Dr. R. Bisschop leading with an account of the proposed International Law Academy. The Bibliography in Section VI is in the hands of Dr. R. Lehmann, and appears to be most useful and complete. Altogether, an astonishing work, representing enormous labour, and beyond question indis-

pensable. A word of caution to the British reader: it is an Annual of Völkerrechts and has nothing to say to International Private Law. There is a good deal of English and French matter, and no language more recondite than German.

Essays in Legal History read before the International Congress of Historical Studies, held in London in 1913. Edited by PAUL VINOGRADOFF, F.B.A. Oxford: The University Press. 1913.

The collection of papers in this volume consists of communications presented to the section of Legal History of the International Congress of Historical Studies held in London last spring. In those instances where only extracts were actually read, the papers are reproduced here *in extenso.* On the other hand, the minutes of the discussions which followed the readings have been omitted, since most of the principal points were afterwards embodied in the revised texts of the communications.

Professor Vinogradoff, in his presidential address, drew attention to the two main points of view from which the study of law may be approached. "They are provided," says the Professor, "by continuity on the one hand and by similarity on the other." The former may be called the current of cultural tradition, the latter the application of the comparative method.

The foreign contributors to this polyglot volume are known by name at least to most English students of legal history. They are Professors Wenger, Riccobono, Lenel, Schrener, Taranger, Caillemer, Von Gierke, Galante, and Hübner; the late Professor Esmein, and Drs. Konopczynski, Lappo, and Danilevskij.

The English contributors are Sir Frederick Pollock, Drs. Blake-Odgers, Hazeltine, and Holdsworth; Professors E. C. Clark, and H. Goudy.

It is invidious to select one contribution more than another for special mention. But the paper entitled "The Early History of Equity," by Dr. Hazeltine, will arrest the attention of all students of English law by its remarkable originality. Mr. Bolland's discovery of the equitable jurisdiction exercised by the Itinerant Justices in the Eyre of Kent, in the reign of Edward II, might have raised more than suspicion, but it has been reserved for Dr. Hazeltine to prove conclusively that equitable relief was granted by the Common-Law Courts—the King's Bench, Common Pleas, and Exchequer—as part of the Common-law procedure, long before the Court of Chancery

had come into existence. Thus all hitherto accepted theories of the origin of equitable jurisdiction are exploded, and must be re-adjusted in the light of new facts.

Bar, Bat and Bit: Recollections and Experiences. By the Hon. Sir EDWARD CHANDOS LEIGH, K.C.B., K.C. Edited by F. ROBERT BUSH, M.A. With Illustrations. London: John Murray. 1913.

We opened this book with the liveliest anticipations of pleasure, but we closed it with something akin to regret, that one with such exceptional advantages should not have made fuller use of his opportunities. After a somewhat confused account of his family history, the learned Author deals with his school days at Harrow, his career at Oxford, and his early days in London. Next follow two chapters dealing with his progress at the Bar, from his call in 1859 to his appointment as Counsel to the Speaker in 1884, and his retirement from the Recordership of Nottingham in 1907. The remaining two chapters are concerned with cricket and hunting respectively. It is perhaps unreasonable to demand great literary ability, even from a successful lawyer, and we can easily forgive its absence when the substance is present. The pages of this book are, it is true, crowded with the names of great personages whom Sir Chandos met during a long life. But he has little to tell us about them of interest to anyone outside his own family. The "good stories" for which we looked may be counted on the fingers of one hand. If Mr. Bush had used his blue pencil more freely, this might perhaps have been a more entertaining book.

Second Edition. *The Student's Summary of the Law of Contract.* By J. G. PEASE. London: Butterworth & Co. 1913.

When the first edition was brought out in 1908 the names of Messrs. Pease and Latter appeared as joint Authors; the present edition is brought out by Mr. Pease alone. Occupying the position of Assistant-Reader in Common law to the Council of Legal Education, the learned Author should possess all the necessary qualifications for writing a book of this nature. Unambitious in character, it does not aspire to compete with the more comprehensive treatises, and within its scope is worthy of great commendation. The text is made up of various propositions which incorporate the leading principles of the Law of Contract, with practical illustrations

appended. Considerably re-written, added to and revised, this book may well prove of the utmost practical utility to students preparing either for call to the Bar or for admission as solicitors.

Second Edition. *The Principles of the General Law of Mortgages.* By J. A. Strahan, M.A., LL.B. London: Sweet & Maxwell. 1913.

It seems a pity that a writer of Mr. Strahan's undoubtedly great ability should seize the opportunity of his Preface for girding at Common-law Judges, and accuse them of displaying scorn of the Law of Mortgages, basing his opinion upon some unusual utterances made by Lord Bramwell in *Salt* v. *Marquess of Northampton* (L. R. [1892], A. C., at p. 19). In the second edition cross-references are given to the Indian Code affecting mortgages, and in Appendix III is given the Indian law of mortgage. In these days, when so many Civil servants are called to the Bar, these additions will be much appreciated. The text, which is in the learned Author's very best style, is remarkably lucid and to the point. Simple and at the same time erudite, one can quite understand Mr. Strahan's qualifications for the positions of Professor of Jurisprudence to the University of Belfast and of Reader of Equity to the Inns of Court, London. The subject of Mortgages is carefully traced through the threefold channels of old Common law, Equity, and Statute, down to the outfall as it exists at the present moment. Appendix I contains the most important Statutes affecting Mortgages, and Appendix II comprises the relevant sections from the Land Transfer Act 1875 (38 & 39 Vict., c. 87), and the Land Transfer Act 1897 (60 & 61 Vict., c. 65). The Index serves as an excellent clue to the subject-matter in the text.

Second Edition. *Law and Politics in the Middle Ages, with a Synoptic Table of Sources.* By Edward Jenks, M.A., B.C.L. London: John Murray. 1913.

This edition does not differ substantially from the first edition published in 1897. A few errors of detail have been corrected: certain phrases, which in the course of sixteen years had acquired an archaic flavour, have been modified, but the more important conclusions have been left unaltered. The most valuable addition is to be found in the references in the Notes to the masterly edition

of the Anglo-Saxon Laws by Dr. Lieberman, which has appeared since the original publication of this work.

In his treatment of his subject Mr. Jenks departs entirely from the orthodox view of law as a command issued by a sovereign power to its subjects. The force of inherited experience, termed instinct, in its results is hardly to be distinguished from law. As men became associated in groups this inherited experience was transmuted into custom enforced upon all within the group by social force. As changes in custom commended themselves to general acceptance, they also became law. It was not until the full development of the State in the later Middle Ages that law was either imperative or enacting. With trifling exceptions of comparatively small importance law was declaratory. Law was declared, it was not made.

The key to the internal politics of the Middle Ages is to be found in the study of the struggle between the Clan and the State. It is the recognition and emphasis of this rivalry which makes Mr. Jenk's contribution so valuable, and enables the student to trace so clearly the sources of law. "Its existence," as Mr. Jenks points out, "contributes to mediæval history that curious dualism, with its inconsistencies and its oddities, which is to many students the chief charm of the period."

Fourth Edition. *Kerly on Trade Marks and Trade Names.* By F. G. UNDERHAY, M.A. London: Sweet & Maxwell. 1913.

It is now five years since the last edition appeared, and "much water has flowed under London Bridge" since then. Many decisions have been given on the Patents and Designs Act 1907 (7 Edw. VII, c. 29), both in the Court of Appeal and in Courts of first instance. Mr. Underhay apparently is of opinion that the Courts have not interpreted this Act with the breadth of view which was expected; but, after all, the Courts are bound to interpret the law as stated and not as the lay mind expects it to be. The Trades Marks Acts of America and of Australia appear in the Appendix. Australian and New Zealand decisions have been noted by Mr. B. A. Levinson of the Australian Bar, and appear in the Appendix. Another new feature is the Revised International Convention of Washington, 1911, which was ratified during 1913, of which a translation is given. Decisions have been brought down to July 31st, 1913, but certain Appeals decided just before the Long Vacation, and which were shortly noticed in the text, have been given at greater length in the

Addenda which appears just after the Table of Cases. The Index is adequate, but the headings might have been printed in larger or heavier type, so as to catch the eye more readily. The whole work shows signs of the exercise of the greatest care coupled with profound knowledge.

Sixth Edition. *The Student's Guide to Constitutional Law and Legal History.* By C. THWAITES. London: Geo. Barber. 1913.

Mr. Thwaites has since 1884 prepared students for the Bar and Solicitors' examinations, and in fact is regarded as an expert in the matter. It is his intention, by means of questions and answers ou Constitutional Law and Legal History, to give students such information as will enable them to pass their examinations. His digest of subjects necessary to "get up," and his suggestions as to the course of study and books to be read for that purpose, show a wide experience and intuition. On page 39, in the first answer given in drawing a distinction between the Australia Act 1900 and the South Africa Act 1909, he makes a statement which hardly appears to be strictly accurate, He says: "In Africa there is only one executive and *one set of Courts* for the Union; in Australia each State retains its own executive and *set of Courts*, with appeal to the Privy Council or to the Federal Court." Now it is true, in the case of South Africa, to say that there is only one Supreme Court for the whole of the Union, but it must not be forgotten that each Province has its own separate *branch* of the Supreme Court, with its own separate set of judges, exercising a jurisdiction coterminous with each Province. From each of these Provincial branches there is an appeal to the Appellate Division or to the Privy Council. We like very much the answer given to the question: "What do you understand by Imperial Federation?" It shows the various ramifications of this complex proposition in a concise manner, which is most refreshing and at the same time quite impartial. We feel certain that the present edition will prove equally useful and equally popular to the five former ones.

Sixth Edition. *Chitty's Statutes.* Vols. 1—16. By W. H. AGGS, M.A., LL.M. London: Sweet & Maxwell. 1911—1913.

Born in the same year, this Magazine takes especial interest in *Chitty's Statutes.* The first edition of the Statutes was brought out by Mr. J. Chitty in the year 1828. In the same year, Abraham

Hayward, of the Western Circuit, Q.C., founded the *Law Magazine*, with which was subsequently incorporated the *Law Review*, its promotion being the outcome of Brougham's famous speech on Law Reform in April of that year. In 1851–4, it was found necessary to bring out a second edition of the Statutes, under the joint editorship of Messrs. Welsby and Beavan. The latter was responsible for the third in 1865. That well-known jurist, Mr. J. M. Lely, presided over the birth of the fourth and fifth in the years 1880 and 1894 respectively. It will, therefore, be apparent that Mr. W. H. Aggs has had famous predecessors, and it is not flattery to say that he has proved himself worthy of the mantle which has fallen upon his shoulders. The period of time which has passed since 1894 is punctuated with laws which have had wide-reaching effects upon the welfare of the community. For years a Titanic warfare was waged over the question of Appeals in Criminal cases, and in 1907 the question was answered by the foundation of a Court of Criminal Appeal. Whether power will be given to that Court to order a new trial is a question "on the knees of the Gods," but many occupants of the Bench appear to be in favour of such power being granted. The Old Age Pensions Act 1908 was a reform too long overdue. Master and Servant is a heading which covers many new departures in Legislation. The new principles enunciated in the two Acts of 1897 and 1906, still give the Courts much ground for decision upon points of Workmen's Compensation. What threatens to be the predecessor of other Legislation of a similar nature, is to be found in the Coal Mines (Minimum Wage) Act 1912. Law of a paternal nature is to be found in such Acts as the Children Act 1908, and the Criminal Law Amendment Act 1912. The country seems to have received with equanimity reforming measures such as the National Insurance Act 1911, the Finance Act 1910, the Housing and Town Planning, etc. Act 1909, and the Trade Union Act 1913. It would be impossible within the limits of a review, to dissect in detail the monumental nature of the work contained in these sixteen volumes. The general scheme of arrangement has been retained, which is to be commended as having stood the test of time and experience. One novelty is to be noticed, however, and it is one of great practical utility. Each case cited has appended to it the date, the usual references, and lastly, a reference to *Mews' Digest.* In this way a reader may rapidly master the facts of the case cited, and any bearing it may have upon the point he

is looking up. The sixteenth volume is very important, containing as it does: (1) A Table of Short and Popular Titles; (2) A Table of Regnal Years and Chapters; (3) A Table of Statutory Rules and Orders; (4) A General Index, etc., to the previous volumes. The last of these four appears to be comprehensive, illuminating, and to be a sure guide to the whole contents. We think that, in bringing out the sixth edition of *Chitty's Statutes*, Mr. Aggs has added very materially to the laurels which he has already gained as a sound, reliable and discriminating legal writer.

Ninth Edition. *Shirley's Leading Cases in the Common Law.* By R. WATSON, LL.B. London: Stevens & Sons. 1913.

Shirley's Leading Cases is so well known that it requires no commendation from us. Originally written as a Student's Manual, the present Editor has adapted it to the needs of full-fledged practitioners, to quote his pithy phrase, "always remembering that a person does not cease to be a student merely because he is called to the Bar or admitted a Solicitor." Several of the old cases have been omitted by reason of the subject-matter having been crystallized in Statute form. Under Defamation has been included the somewhat startling case of *Hulton & Co.* v. *Jones* (L. R. [1910], A. C. 20). No doubt students will continue to tear out of the book the map, and to pin it up where they can constantly refresh their memory, in many cases ignoring the injunction given to confine this operation to a book which is their own. The ninth edition will undoubtedly prove as useful to the present generation of students as previous ones have been in the past.

Thirty-Second Edition. *The Formation, Management, and Winding-up of Joint Stock Companies.* By F. GORE-BROWNE, M.A., K.C., and W. JORDAN. London: Jordan & Sons. 1913.

The present edition was supposed to be brought up to the end of June this year, but the Companies Act 1913 (3 & 4 Geo. V, c. 25) received the Royal Assent and came into operation on August 15th. The text of that Act has been inserted after page 410, and was intended to meet the difficulties created by the case of *Park* v. *The Royalties Syndicate* (L. R. [1912], 1 K. B. 330). Formerly, a private company retained its privileges as such, even if it violated the rules governing private companies. This defect in the law is corrected by the new Act just passed. Since the thirty-first edition in 1911,

not many important cases have been decided which bear upon company law. Company auditors should read *Cuff* v. *London and County Land Co.* (L. R. [1912], 1 Ch. 440). In *The Birkbeck Permanent Building Society's Case* (L. R. [1912], 2 Ch. 183) the Court once more enumerated the principles governing and the effects resulting from a company borrowing beyond its legal capacity. Those readers interested in Insurance Companies will carefully master the decision in the *Law Car and Insurance Corporation* (L. R. [1913], 2 Ch. 103). The text has been thoroughly revised and considerably amplified after the manner of such masters of their subject as are the two learned Authors of this standard work.

Administration of Foreign Estates. By E. L. BURGIN. London: Stevens & Sons. 1913.—Whether or not, as the Author is of opinion, the learning of the great professors of international jurisprudence is inaccessible to the greater part of the legal profession, or presented academically rather than usefully in daily affairs, a book which aims at utility for its first object ought to be welcome in a very wide circle. There is one great recommendation the work has: many of the problems in it seem to have come before the Author in actual cases, and such a circumstance gives a special value to matters thus practically solved. The chapter on domicile and its power in administration and succession is, amongst others, very explicitly and fully written; and, throughout, the book is one that may be very usefully consulted.

Chitty's Statutes of Practical Utility. By W. H. AGGS. London: Sweet & Maxwell. 1913.—In this selection, nineteen of the Statutes passed as late as March in last Session are included. The work seems to have escaped only narrowly from being published in two parts. As even now it only slightly exceeds 150 pages, the escape is fortunate. Amongst the Statutes are of course the Coal Mines (Minimum Wages) Act 1912, which apart from the Trade Boards Act 1909, was "the first attempt to regulate by Act of Parliament the wages of a great industry"; the Trade Union Act 1913; and the Criminal Law Amendment Act 1912. The marginal notes to the King's Printers' issue are not identical with those used by the Author, but are varied for the purpose of improvement. The footnotes are very helpful, and will remove difficulties of construction or interpretation that otherwise might arise.

The Law of Domestic Servants. By J. D. CASSWELL, B.A. London: Jordan & Sons. 1913.—If this small volume, costing a trifle, were purchased by every householder, it would save him or her much worry and many a visit to the family solicitor. In simple language, Mr. Casswell gives full information as to the nature of Domestic Service, the contract of service, its termination, and all the incidents relating to Domestic Service. Employers and employed will take special interest in Chapters IX and X. In the former chapter a servant can see at a glance whether he or she is entitled to an Old Age Pension, the amount, and the right method of getting it. In Chapter X we have full information given with regard to those portions of the National Insurance Act 1911 which affect Domestic Servants. The Index is simple in form and non-technical in language.

Workmen's Compensation Appeals. By C. Y. C. DAWBARN. London: Sweet & Maxwell. 1913.—The cases in this interminable subject which have gone to appeal during the twelve months named are arranged under the appropriate divisions of the Acts, and in minuter detail in subdivisions, in which a meaning has been attached by the Court to the debatable expressions of the Legislature. These cases are well up-to-date, for some of them (*Dight* v. *Owners of Crarister Hall* for instance) had not, when the book was issued, been reported. Some valuable suggestions for the consideration of the parties concerned are supplied by the Author in the Preface.

The Law relating to Tug and Tow. By ALFRED BUCKNILL. London: Stevens & Sons. 1913—This book on a difficult subject has the advantage of an Introduction by Mr. Butler Aspinall. Two chapters of special importance are those on the relations of tug and tow to third parties, and on the division of loss incurred. The cases in these chapters are very clearly set out. There could be no better criterion of the merit of the work than Mr. Butler Aspinall's statement, that the Author has succeeded in presenting succinctly and accurately the law on the subject.

Medical Jurisprudence. By Dr. W. RAMSAY SMITH. London: Stevens & Sons. 1913.—The Author has set himself "the novel task of viewing the principles and practice of Medical Jurisprudence from the standpoint of the Court, the Bench and the Judge," and,

from a mass of material, legal and medical, derived from others and from original observations and experiments of his own, has given examples of medico-legal investigation, especially in criminal cases. Far from being dry, the book is entertaining, from the number of anecdotes which it relates. The subject of teeth, for instance, is linked up with the question of what became of the Dauphin Louis XVII. But all these anecdotes are strictly conformable to the scientific part of the subject they illustrate.

The Law relating to the Mentally Defective. By HERBERT DAVEY. London: Stevens & Sons. 1913.—This is a critical annotation of the Mental Deficiency Act 1913; and it is probably the first book issued on the Statute; for the Act, except as to the appointment of officers, does not come into operation till the 1st of April next. As its provisions affect, amongst others, the County and Borough Councils and various local authorities, as well as magistrates and authorities dealing with Poor law, Education, &c., the book has interest for a large body, independent of its concern to the legal profession, and will, therefore, no doubt be found useful by a very important class—in England at least, for the Act does not extend to Scotland or Ireland.

Third Edition. *An Epitome of Leading Cases in Equity.* By W. H. H. KELKE, M.A. London: Sweet & Maxwell. 1913.—At the suggestion of the publishers of White & Tudor's *Leading Cases in Equity* Mr. Kelke wrote this little book, which was to serve as an introduction. It is intended for beginners and only deals with broad principles, leaving the student to consult the fountain head for greater elaboration. We must confess that to us the learned Author's staccato and telegraphic style of writing becomes, after a time, slightly irritating. His abbreviations also have a tendency to aggravate this peculiarity, moreover, the List of Abbreviations, given at the commencement, does not by any means embrace all those that he makes use of. Of course we do not allude to abbreviations of Law Reports *et hoc genus* but to the contractions of everyday words. Certainly the text shows careful study and knowledge, so that it will prove of great utility to students, but it is in the Author's style of writing that we find cause for criticism not in his matter, which is excellent.

Third Edition. *The Land Transfer "Scandal."* By J. S. RUBINSTEIN. London: Sweet & Maxwell. 1913.—This brochure embodies a Paper read by Mr. Rubinstein at Nottingham in September, 1911, the occasion being the Law Society's Meeting. Mr. Rubinstein illustrates once more the patching-up process which has gone on in England with regard to the law of Transfer of Land, and shows how impossible it is to put new patches on an old coat. He apparently is in favour of the Registration of Deeds and opposed to the registration of title; this shows a curious confusion of thought. The writer of this notice is unaware of the working of the Torrens' system in Australia and New Zealand, but is well aware of the system in the United States and South Africa, where it works very smoothly and well. In both those countries Registration is the title to land, and without Registration there is no title. In South Africa all clogs on the title are registered, and are only legal against the whole world if so registered. The Deeds of title are registered, an official *précis* made of them, the original documents constituting a clog on the title are registered, so that the Deeds Registry constitutes a title and deeds registry at one and the same time. Of course the opponents of the system say that great hardship would be worked and great cost incurred in bringing about the initial Registration. This cry was raised in California when it became a Territory, as most of the titles were old Mexican grants, vague and indefinite. The difficulty was overcome, surveys made and titles passed, and to-day Registration is in full force. We should like to hear Mr. Rubinstein upon this aspect of the question, as he has presented his case so ably upon the other side of the shield.

Third Edition. *A collection of Latin Maxims and Phrases.* By JOHN D. COTTRELL. London: Stevens & Haynes. 1913.—This book contains a very useful collection of Latin Maxims commonly found in law and was first published in 1881. Of course it does not pretend to be as complete or comprehensive as *Broom*, but will be of great use to students. We think that the learned Author is somewhat sanguine when he suggests the committal to memory of those maxims which he has marked with an asterisk—the demand is too great. The present edition is brought up to date, but shows signs of careless or hurried proof reading. A cursory examination displays several misprints both in the maxims and in the general

text, which can only be the result of want of care, as they are obviously printer's errors. Apart from this small defect we feel great confidence in recommending this little work to students and even to the legal world at large.

The Companies' Diary and Agenda Book 1914. Edited by J. H. DEVONPORT. London: Jordan & Sons.—A useful Diary both for Secretaries of Companies and business men generally, as, in addition the special information relative to Joint Stock Companies, a wide range of general information is given, which will be found of the greatest assistance in any business office.

Books received, reviews of which have been held over owing to want of space:—Williams' *Law of Personal Property*; Webster-Brown's *Finance Acts relating to the Estate Duty*; Cleveland's *The Venezuelan Boundary Question*; Niemeyer's *Urkundenbuch Zum Seekriegsrecht*; Fitzpatrick and Haydon's *Secretary's Manual*; Ingpen's *Executors and Administrators*; *Butterworths' 20th Century Statutes, Vol. 9*; *Bunyon's Life Insurance*; Newbolt's *Summary Procedure in the High Court*; Browne's *French Law and Customs for the Anglo-Saxon*; Williams and Harris' *The Cinematograph Act 1909*; Tarring's *Law relating to the Colonies*; Atkinson's *Magistrates' Practice 1914*; Hobhouse's *Local Government and Local Taxation*; Montgomery's *Licensing Practice*; Coldridge's *Law of Gambling*; Arnold's *Psychology applied to Legal Evidence*; Willis' *Workmen's Compensation*; *Butterworths' Workmen's Compensation Cases, Vol. VI*; *Paterson's Licensing Acts.*

Other Publications received:—Arminjon's *Le Droit International Privé Interne* (Marchal & Godde, Paris); Sir H. Erle Richards' *Panama Canal Controversy* (Clarendon Press, Oxford); Valery's *Manuel de Droit International Privé* (Fontemoing et Cie, Paris); *Questions Pratiques de Droit International Privé*, for June and July, 1913; Borchard's *International Contractual Claims and their Settlement*; Macfarland's *The Supreme Court of the World* (American Socy. for Judicial Settlement of International Disputes); Bennett and Bartlet's *Disendowment* (Liberation Society); Fry's *The London Charities* (Chatto & Windus); Redslob's *Abhangige Lander* (Veit & Comp., Leipsig); *Report of Register of Copyrights 1912 13* (Library of Congress, Washington).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal.*

THE

LAW MAGAZINE AND REVIEW.

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I.—THE MONROE DOCTRINE: "BE A NATION, BE AMERICANS."

IN September 1796, Washington published his farewell address. "Be united," he said, "be Americans. The name which belongs to you in your national capacity must exalt the just pride of patriotism more than any appellation derived from local discriminations. . . . Observe justice and good faith towards all nations; have neither passionate hatreds nor passionate attachments to any, and be independent politically of all. In one word, be a nation, be Americans, and be true to yourselves."

This was the immortal admonition of George Washington to the American people. It was the clarion call of a great soldier, a great statesman and a great patriot, to future generations of Americans—a call that will never be unheeded through the ages to come. It was, and it is hoped always will be, the foundation of the country's foreign policy.

The principles of the foreign policy of the United States were inaugurated when George Washington took the oath of office as President of the United States, and while the decision to stand apart from European conflicts was made clear in the proclamation of neutrality in the war between France and England, there was nothing new in this policy.

It had been outlined ever since Washington became President as co-equal with American independence, and as the only path that could lead to future greatness.

The political system on which the United States is founded is constitutional liberty and the political safety and happiness of a free people. As Seward said: "Americanism is one interest, and ought to be one sentiment throughout this continent."[1] This national spirit—this keen sense of the new Republic's political system—is seen in the utterances of the statesmen of the day in their patriotic appeal for unity and consolidation among all republican States.

A few instances show the gradual development of these principles. In a letter to Morris in December 1795, Washington wrote: "My policy has been, and will continue to be while I have the honour to remain in the administration, to maintain friendly terms with, but to be independent of, all the nations of the earth."

Again he declared in these touching words: "Born, sir, in a land of liberty; having early learned its value; having engaged in a perilous conflict to defend it; having, in a word, devoted the best years of my life to secure its permanent establishment in my own country, my anxious recollections, my sympathetic feelings and my best wishes, are irresistibly excited whenever in any country I see an oppressed nation unfurl the banner of freedom."[2]

John Adams declared in his annual address, December 8th 1798, that "a manly sense of national honour, dignity and independence has appeared, which, if encouraged and invigorated by every branch of the Government, will enable us to view undismayed the enterprises of any foreign power and become the sure foundation of national prosperity and glory."

In a letter to Thomas Paine, March 1801, Jefferson wrote: "We shall avoid complicating ourselves with the

[1] Moore, *Int. Law Dig.*, 6 V., 19. [2] Moore, 6 V., 46.

powers of Europe even in support of principles which we mean to pursue."[1]

In 1820, when the Portuguese minister felt so self-assured as to propose that Portugal and the United States, as the two great Powers of the western hemisphere, should join hands in a great American system, Adams, after suppressing his amusement at the idea, exclaimed: "As to an American system we have it; we constitute the whole of it."[2]

During the discussion regarding the acquirement of the Floridas, Adams, in opposition to those who advocated a moderate policy on account of the suspicions of England and France, affirmed that he was not in favour of our giving ourselves any concern whatever about the opinions of any foreign Power. "If the world do not hold us for Romans," he said, "they will take us for Jews, and of the two vices I would rather be charged with that which has greatness mingled in its composition."[3] He was quite ready to have the world become familiarised with the idea of considering our proper dominion to be the continent of North America.

In a letter to Rufus King dated December 16th 1796, he wrote: "We are labouring hard to establish in this country principles more and more national and free from all foreign ingredients, so that we may be neither Greeks nor Trojans, but truly Americans."

"Our situation," wrote Hamilton, "invites and our interests prompt us to aim at an ascendant in the system of American affairs."[4]

We were to be dominant, declares Lodge, in the Western Hemisphere. We were not only to be neutral as to the affairs of Europe, but we were to exact from Europe neutrality in all regarding America, and were to crush out European influence.[5]

[1] Jefferson's Works, IV, 370. [2] Morse, *John Quincy Adams*, Jr., 129.
[3] *Ibid.*, 134. [4] I Federalist, 77.
[5] Lodge, *Alexander Hamilton*, 210, 211.

It took time and a herculean struggle before the politics of the country shook off the jealousies and petty strifes of colonialism and emerged into the great and broader realms of nationalism; before that national sentiment, which has gradually and progressively led us into being a great nation, could permeate thoroughly the minds and hearts of the people, smothering the embers of sectional dissension and political party wrangling. A new generation had sprung into manhood before the politics of the country were finally taken out of colonial feudalism and made co-ordinate with the national American spirit; but the idea was that of Washington. It was his foresight and courage which at the outset placed the United States in their relations with foreign nations on the ground of a firm independent and American policy.[1]

The policy of maintaining the independence of the American continent from foreign interference had long been foreshadowed.

On January 3rd 1811, President Madison sent a secret message to Congress recommending that the executive be authorized to take possession of any part of the Floridas in case there should be apprehension of the occupancy of the territory by a foreign Power other than Spain. Acting on this message, Congress in secret session on the 15th, taking into view the peculiar situation of Spain and of her American provinces, and the influences which the destiny of territory adjoining the southern border of the United States might have upon their security, tranquillity and commerce, resolved that the United States could not, without serious inquietude, see any part of that territory pass into the hands of any foreign Power, and that a due regard to their own safety compelled them to provide, under certain contingencies, for the temporary occupation of the said territory.[2]

[1] Lodge, *Washington*, 213, 214.
[2] Moore, 6 V., 372.

In May 1818, over five years before the promulgation of the Monroe doctrine—the cabinet was unanimous in instructing ministers of the United States in Europe not to join in any project of interposition between Spain and the South Americans which should not be to promote the complete independence of those provinces; while two months later Rush informed Castlereagh that his government would not co-operate in any plan of pacification except on the basis of the independence of the colonies.[1]

So John Quincy Adams, as Secretary of State in May 1823—over six months before the Monroe doctrine appeared—gave a decided impulse to the same principle as a defined and recognized policy of the United States. In his written instructions to Mr. Anderson, minister plenipotentiary to Colombia, dated May 27th 1823, he recited the policy of the United States in their future political intercourse with the new nations of South America. "Our doctrine," he wrote, "is founded upon the principles of unalienable right. The European allies, therefore, have viewed the cause of the South Americans as rebellion against their lawful sovereign. We have considered it as the assertion of natural right. They have invariably shown their disapprobation of the revolution, and their wishes for the restoration of the Spanish power. We have as constantly favoured the standard of independence and of America."[2]

In the words of Madison, the people of the United States accomplished a revolution which has no parallel in the annals of human society. They reared the fabrics of governments which have no model on the face of the globe. They formed the design of a great confederacy which it is incumbent on their successors to improve and perpetuate.[3]

To the Federalists—those sturdy patriots who did so much to secure our greatness as a nation—belongs the

[1] Adams' Diary, IV.
[2] Elliott, *Am. Diplomatic Code*, 2 V., 656, 657.
[3] I Federalist, 94, 95.

greatest credit of first formulating, what later became by a process of adoption, the declared policy of the country. No one ever possessed a clearer conception of the Nation's needs and the foreshadowing of its future greatness than Alexander Hamilton. He was the embodiment of what later became known as the Monroe doctrine; in him its principles glowed with patriotic fervour; in him its splendid possibilities were personified. It was he who long planned to obtain complete control of the valley of the Mississippi and acquire Louisiana and the Floridas. These ideas, says Lodge, were of long standing and were part of that conception of nationality and national greatness which was the predominating influence in Hamilton's public career.[1]

No other man of that period except Washington was more fully imbued with the national spirit. To Hamilton it was the very breath of his public life, the essence of his policy. To this grand principle many men, especially in later times, have rendered splendid services and made noble sacrifices; but there is no single man to whom it owes more than to him. In a time when American nationality meant nothing, he grasped the great conception in all its fulness, and gave all he had of will and intellect to make its realisation possible. He and Washington perceived the destiny which was in store for the Republic. For this he declared that the United States must aim at an ascendency in the affairs of America.[2]

George Washington, Hamilton, John Adams, Thomas Jefferson, John Quincy Adams, James Monroe, and James Madison, each contributed his share in furthering the progressive and expansive policy that gradually developed with the growth and security of the United States as a nation, but to no one of them can the origin of the principles on which the Monroe doctrine is based be exclusively traced. Like Topsy, these principles were not born—they grew.

[1] Lodge, *Alexander Hamilton*, 209. [2] *Ibid.*, 278, 279.

The germ from which our foreign policy sprang was self-protection, the maintenance of our political system of government, and our expansion and greatness as a nation. Every man who had the interests of the new Republic at heart, and who had passed through the bitter battle for political supremacy, when the new Constitution was tossed like a cockle-shell amidst the angry seas of party violence and sectional discord, before it finally emerged as the pearl of our future greatness, thought only of securing our land from foreign interference; in perfecting and perpetuating our political system of government; in protecting the rights and interests of the United States; in the establishment of a great nation. These fundamental principles were the fruit of our hard-gained liberty, and whether Federalist or Republican or Democrat, the foremost leaders of the day pledged themselves irrevocably to their maintenance. The principles of our foreign policy had their origin in the blood and sinew sacrificed to emancipate an overburdened and oppressed people who gave to the world an example of the best system of representative government human sagacity has yet devised. The principles of our foreign policy are the product of no one man, but rather the natural growth and outcome of our national independence. They are those principles that pervaded the hearts and minds of all the great patriots of the day; they are the result of our free representative political system and the natural off-spring of a liberated people.

It is evident therefore that, before the publication of the Monroe doctrine, the principles on which it is founded had been openly and frequently proclaimed. They were recognized as just as much a part of our political life as the Constitution itself. In order, however, to understand the full meaning and application of the doctrine as declared by President Monroe, it becomes necessary to review the political conditions then existing and note the clouds that

darkened the horizon, not only threatening the peace but the stability of the new Republic in America.

At the beginning of the last century the United States was the sole free and independent nation in the western hemisphere. Outside the limited area embraced within the thirteen original free and independent States, the whole of the American continent was held within the grasp and sovereignty of monarchical government. Such a thing as a South American Republic was unknown. Within the next twenty-five years, however, the whole face of Central and South America underwent a radical change, and when James Monroe became President of the United States the foreign colonies had become transformed into free and independent States. They had successfully thrown off the yoke of oppression and formed themselves into self-relying and self-directing Republics.

In 1815 the Holy Alliance was concluded between the Emperors of Russia and Austria and the King of Prussia, and was subsequently joined by France. The Holy Alliance was a solemn compact which, while under the pretence of confessing that the Christian nations, of which they and their people formed a part, had no other sovereign than God, and their Divine Saviour Jesus Christ, "the Word of the Most High, the Word of Life," yet provided that they would lend one another, on every occasion, and in every place assistance, aid and support.[1]

This was followed by the secret treaty of Verona, of November 22nd 1822, to which France was a party. No proper conception of the political situation of the day or of the antagonistic and hostile attitude of the contracting Powers to every principle of freedom and personal liberty, for which the United States had fought and succeeded, can be had without considering the two first articles of this treaty, which were as follows:—

[1] Elliot, p. 178.

"Art. 1. The high contracting powers being convinced that the system of representative government is equally as incompatible with the monarchical principles as the maxim of the sovereignty of the people with the divine right, engage mutually, in the most solemn manner, to use all their efforts to put an end to the system of representative government, in whatever country it may exist in Europe, and to prevent its being introduced in those countries where it is not yet known.

"Art. 2. As it cannot be doubted that the liberty of the Press is the most powerful means used by the pretended supporters of the rights of nations, to the detriment of those of Princes, the high contracting parties promise reciprocally to adopt all proper measures to suppress it, not only in their own States, but also in the rest of Europe."[1]

As the aim of the secret treaty of Verona was, as it boldly declared, to put an end to the system of representative government and suppress the liberty of the Press, it was but natural that the United States, founded as it is on a diametrically opposite system, should have become alarmed. It was a direct challenge to the Republics of America, although tentatively aimed at Europe, so that the maintenance of a constitutional and free political system became vital to the independence of the United States. This helped to publicly promulgate those principles which subsequently found expression in the memorable message of President Monroe.

The principles on which this alliance was proposed were supposed to be of the most exemplary nature and for the administration of government according to the precepts of justice, charity and peace; but the real object of the league was to maintain the monarchical form of government and overthrow those States which had created a constitutional form of government. In a circular issued at Laybach they denounced "as equally null, and disallowed by the public

[1] Elliot, p. 179.

law of Europe, any pretended reform effected by revolt and open force," but as every constitutional government is and ever has been the result of "revolt and open force," it can readily be seen that the aim of the Holy Alliance was to exert the combined power of the League in the suppression of self-government of the people and by the people.

The first overt act of this monarchical combination was in April 1823, when France proceeded to carry out the plans of the allies by invading Spain with the object of restoring an absolute monarchy under Ferdinand VII, and so speedily and successfully was this design put into execution that before the following autumn the allies notified Great Britain that as soon as they had achieved their military objects in Spain they would convene a Congress with a view to terminating the revolutionary governments in South America. Lord Castlereagh, who had always been favourably disposed toward the Holy Alliance, had providentially been succeeded as Secretary for Foreign Affairs by George Canning. Canning at the time reflected the popular sentiment of the people, which was violently opposed to the arbitrary monarchical designs of the Holy Alliance. He was keenly alive to the gravity of the situation, and especially the great value of the commercial interests Great Britain had acquired in its trade with the new South American Republics. He realized that any effort tending to overthrow the South American Republics or any invasion of their territory by a foreign Power would prove disastrous to England's trade. He knew that no country had a greater interest geographically, politically, morally and commercially, than the United States, in the maintenance of the South American States from European interference, intimidation or invasion, and with the keen sagacity of a clever politician, he at that critical moment turned to the United States for co-operation and support.

It was August, and Canning was about to leave London for several weeks. He was anxious and disturbed over the political outlook — apprehensive of the sudden turn matters might take should success crown the efforts of France in the Peninsula. In this state of mind he hesitated to leave town without a further effort towards carrying out his original idea of a combined declaration of policy on the part of England and the United States. Fully alive to the importance of immediate and united action, Canning under the cover of "private and confidential" sent a letter to the United States Minister, Mr. Rush, in which he said:—

> "Is not the moment come when our governments might understand each other as to the Spanish-American colonies? and if we can arrive at such an understanding, would it not be expedient for ourselves and beneficial for all the world, that the principles of it be clearly settled and clearly avowed? For ourselves we have no disguise:
>
> I.—We conceive the recovery of the Colonies by Spain to be hopeless.
>
> II.—We conceive the question of the recognition of them, as independent States, to be one of time and circumstances.
>
> III.—We are, however, by no means disposed to throw any impediment in the way of an arrangement between them and the mother country by amicable recognition.
>
> IV.—We aim not at the possession of any portion of them ourselves.
>
> V.—We could not see any portion of them transferred to any other Power with indifference.
>
> If these opinions and feelings are, as I firmly believe them to be, common to your government with ours, why should we hesitate mutually to confide them to each other, and to declare them in the face of the world."

Mr. Rush acknowledged Canning's letter and the friendly spirit of confidence upon which it was founded, and said that it would give him great pleasure to promptly cause Mr. Canning's suggestions to be brought to the notice of the President.

On receiving the exchange of letters between Canning and Rush, President Monroe, considering they involved interests of the highest importance, immediately transmitted them to ex-Presidents Jefferson and Madison. "I do not wish to trouble either of you with small objects," he wrote, "but the present one is vital, involving the high interests, for which we have so long and so faithfully and harmoniously contended together." The importance of the principles involved, and the opportune moment for the promulgation of a decided policy, were instantly grasped by Jefferson. Unhesitatingly, and without a day's delay, he replied to President Monroe: "The question presented by the letter you have sent me," he wrote, "is the most momentous which has ever been offered to my contemplation since that of independence. That made us a nation; this sets our compass and points the course which we are to steer through the ocean of time opening on us." Ex-President Madison sent his hearty concurrence in the proposed policy, but took occasion to caustically remark to Jefferson: "Why Mr. Canning and his colleague did not sooner interpose against the calamity, which could not have escaped foresight, cannot be otherwise explained but by the different aspect of the question when it related to liberty in Spain, and to the extension of British commerce to her former colonies."

Canning was a keen, astute politician. He hated democracy while adhering to constitutional government, but at heart would have preferred an absolute monarchy. Waterloo had been fought and won, but France had again risen a potential and dangerous foe whose interests and alliances had sided her against those of England. What Canning most feared was European interference with England's growing South American trade, and seeking to block the possible demonstration of the allied Powers in that quarter, he diplomatically sought the good

offices of the United States to pull the chestnuts out of the fire. But he underrated the ability and character of those with whom he was dealing, and at the same moment, when he was seeking for joint action by the United States with England, he was secretly negotiating with France, with the result that in October 1823, he secured a positive declaration from the French Government disowning any intention to appropriate any part of the Spanish possessions in America, and of any intention of acting against them by force of arms. The tentative efforts he had set on foot for a joint declaration by England and the United States against the Holy Alliance had, however, already taken definite shape, and, to his own bewilderment, the principles declared by President Monroe and the policy the United States would adopt immediately followed his secret understanding with France, and became an established fact.

Canning had no principle to offer. What he did was to suggest instances for the manifestation by our government of a desirable policy. It remained for President Monroe to officially announce the principles on which the foreign policy of the United States is founded; and then, following to a certain degree the recommendations of Canning, to give some of the instances wherein, from the American point of view, the principles would be applied.

The cardinal principles dominating the Monroe Doctrine are:—

First: The establishment and maintenance among the other Republics on the Western Hemisphere of the republican political system on which the United States is founded, and not to allow any interference therewith by any European Power.

The contingencies that might arise, mentioned by President Monroe, and the policy to be applied to them, were based on this elementary proposition. This is apparent from the President's own words: "To the defence of our

political system, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted."

Second: The protection of the rights and interests of the United States, which are co-equal with those of its citizens.

The contingencies that might arise, mentioned by President Monroe, and the policy to be applied to them, were also based on this further elementary proposition. This is apparent from the President's own words: "The occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved."

Every declaration of foreign policy the United States has made can be brought within one of the two general rules above mentioned. The particular grounds of apprehension referred to in the message of Monroe were only an enumeration of some of the then existing causes that might come within the two elementary principles proclaimed. The specific instances that would meet with resistance, and those where no action would be taken set forth, were not a reiteration of the constituent parts of the doctrine, but only illustrations of their application; and no greater error could be made than that which has become almost universal of confusing the two—mistaking the application of the principles on which the Monroe doctrine was established for the principles themselves. It is by misconception of the fundamental truths of the doctrine, and not separating these from the time, method, and occasion of their employment, that confusion has arisen and attention been distracted from that inherent sense of justice and patriotic sentiment from which our foreign policy had its birth, and which has done so much towards securing the wealth and prosperity of the free Republics of the American continent. And if one goes through the voluminous documentary history of our foreign relations, no instance is to be found of any action or decision

being taken by our Government where the facts did not bring the matter under consideration within the comprehensive terms of one of the two great cardinal rules above stated and as laid down by James Monroe.

A doctrine is one thing and its application another. No one can consistently complain of the principles embodied in the Monroe doctrine. The American people at large have accepted it as the charter of their rights in their dealings with other nations, and will not permit of anything that might derogate from the rules thereby laid down. But the application of the doctrine is another matter. This must depend on the peculiar conditions and circumstances existing at the time, and whether the application is wise or unwise, proper or improper, justified or unjustified, depends to a large degree on public sentiment, and whether the administration is backed and fortified by the voice and approval of the people. And, so far as the application of a doctrine is concerned, there are no rules or limitations within which political discretion or foresight can be restrained. It is co-equal with the statesmanship that at the moment steers the craft of national greatness and expansion.

Peace and not war, arbitration, and the friendly settlement of differences are based both on the republican system of government of the United States and the protection of its rights and interests.

Non-interference is based on the republican system of government of the United States; non-interference is not the principle, but merely a negative instance of the application of the principle.

Interference is based on the protection of the rights and interests of the United States; interference is not the principle, but merely an instance of the application of the principle.

The protection of life and property is based on the republican system of government of the United States; the

protection of life and property is not the principle, but merely an instance of the application of the principle.

And so one could go on through the innumerable instances where the United States Government has acted, all of which only illustrate one or both of the great principles underlying the foreign policy of the country.

If anyone doubts this, it is because he has been brought up to regard the Monroe doctrine from a narrow, contracted point of view, and because its fundamental truths have become so confused and blended with the manner of their employment that he has not attempted to discriminate between one or the other. Suppose, for illustration, you have a son and a daughter and you lay it down as a principle that you will not allow your son to use a gun because it is a dangerous weapon, nor your daughter to dance because it is immodest. You may in the minds of some people be right and in the minds of others wrong; but whether right or wrong you propose to stick to your principles. Well, one day a friend invites your son to join in the autumn shooting. You reply courteously but firmly that you regret you cannot allow your son to accept the invitation. Now, is your refusal to allow your son to join the shooting party the principle or merely the application of the principle that in your judgment the use of firearms is dangerous? So with your daughter. She is asked to a dance, but you again courteously but firmly decline the invitation, believing as you do that dancing is immodest. Is your refusal the principle or only an instance of its application? Applying the same reasoning one has no difficulty in arriving at the true and elementary propositions on which the Monroe doctrine is founded, and in seeing how constantly these have been lost sight of in applying the doctrine to the facts of a particular case where the facts involved are stated as the principle itself instead of referring to the principle which justifies its application to the facts.

While the result may practically be the same, yet this method has led to inextricable confusion, and to many people discrediting the glorious purport of what underlies our foreign policy and its almost unlimited sphere of usefulness.

A principle is a fundamental truth while a policy is the course adopted and followed in carrying out the principle—the art and system of conducting the affairs of government. The policy of our Government, like that of every country, is variable according to the opinions and political inclination of the existing administration, and what one President may regard as a wise and prudent policy another President will condemn as inimicable to the public interests. The prudence and wisdom of one period may be disowned and repudiated by another, and frequently these changes occur on the retirement of a ministry or the appearance of a new party in power. An example of this is to be found in connection with the acquirement of the Hawaiian Islands by the United States. A provisional government having been established, a treaty of annexation was signed, and on February 15th 1893 submitted to the Senate by President Harrison with his approval. In his message of transmission, the President said that the overthrow of the monarchy had its origin in the policy of the Queen, which put in serious peril the large and preponderating interests of the United States. "It is essential," he continued, "that none of the other great Powers shall secure these islands. Such a possession would not consist with our safety and the peace of the world."[1] Here we have a clear illustration of the Monroe doctrine pure and simple—the protection of the rights and interests of the United States, and the enforcement of the policy arising out of that doctrine which was the wisdom of annexation. This was the policy of the Harrison administration under the Republican party.

Within thirty days, however, President Cleveland, under

[1] Moore, I. 497.

the Democratic party, having meanwhile assumed office, this treaty was withdrawn from the Senate, and on October 18th following, the newly-appointed minister to the Hawaiian Islands, Mr. Willis, was directed to acquaint the Queen with the President's determination not to send back the treaty to the Senate; to make known to her his regret that the reprehensible conduct of the American minister and unauthorised presence on land of a military force of the United States, had obliged her to surrender her sovereignty for the time being; and to assure her that she might rely on the justice of his government to undo the flagrant wrong.[1] Here we have one President of the United States recommending the approval of a treaty already signed, which another President within eight months denounces as based on a flagrant wrong. Who was in the right depended solely on the correctness of the policy that should be applied in the then emergency; it was a matter of sagacity, shrewdness, and good judgment in dealing with the situation, back of which, and which predominated every manifestation of policy, lay the primary principle of protecting the rights and interests of the United States, which unquestionably were as dear to the heart of President Cleveland as they were to President Harrison. Fortunately, when the islands were finally annexed, the annexation was put upon the proper ground by Secretary Sherman as being justified by the predominant interests of the United States therein, while President McKinley declared that under such circumstances annexation is not a change; it is consummation.

The Monroe doctrine has been misconceived. It has been limited and restricted as a protest against foreign colonisation and European interference on the American continents, and with the gradual disappearance of these grounds of apprehension, the Monroe doctrine has been thought to have become obsolete. No greater mistake than this could

[1] Moore, I, 499.

be committed. Those were simply applications of the principle to maintain our political system at all hazards. The Monroe doctrine, in its broad and splendid comprehension, includes every possible phase of America's foreign policy, not only as of the day when proclaimed, but for all future time. It is, in fact, the constitution of our foreign relations; it is the guide under which can be grouped every emergency that has arisen, or that is likely to arise, involving the prestige, interests, prosperity and credit of the United States. Instead of being a humble momentary protest against a temporary fear, it embodies the spirit of perpetual liberty among free nations. Above all, it takes a firm stand in defence of the interests and security of our country. Viewed thus, the Monroe doctrine looms up among the great achievements of the time, for, in the language of Jefferson, this sets our compass and points the course which we are steering through the ocean of time opening on us.

The Monroe doctrine has been misunderstood. It has not been appreciated in its full grandeur and scope—in its breadth of purpose and splendid possibilities. Some writers and diplomats have attempted to ignore or reject it, but this has been due to their own incapacity to read, inwardly digest, and understand what ought to be plain to every impartial student of American history. What could be clearer or more comprehensive than its own concise language? Within its condensed space are grouped certain instances where the foreign policy of the United States is to be enforced co-extensive not only with the then existing, but but also with the future, needs of the Republic. These applications of the doctrine have been widened and extended as circumstances arose, but the great principles underlying them have never been abrogated or amended, and they form to-day, as they did ninety odd years ago, the framework and basis of our national policy in our dealings and relations with foreign Powers both at home and abroad.

The Monroe doctrine was not a limitation of policy in the same way that the United States Constitution is a limitation of powers. The original Federal Constitution was a comparatively short and concise document. Most of its strength and force to-day is to be found in its sixteen amendments that changed conditions and the exigencies of the times have made necessary. It is not so with the Monroe doctrine. Originally it was broad and comprehensive enough to include not only the then existing policy of the United States regarding foreign Powers, but also the changed and fluctuating conditions and the vicissitudes that the political life of the Republic have made necessary. Whatever these may have been or may be they are all embraced within the Monroe doctrine, because whatever foreign policy the United States has professed since its origin can be traced to that declaration.

One hesitates to attribute the origin of the principles of the doctrine to Monroe when his diplomatic career as minister to France is taken into consideration. Had he then entertained them—had he always been the keen patriot ever on the alert to protect the principles he subsequently officially proclaimed—he would never have lost his head, as he did in France, or forgot he was an American. He readily fell into the scheme that would have made the United States a dependency of France—an act repugnant to every idea of that complete independence we were so strenuously striving to maintain—with the result that he was disowned at home, discredited in France, and succeeded in getting our relations with that nation into a state of dangerous complication.[1] Commenting on the vindication which Monroe subsequently published, Washington said: "There is abundant evidence of his being a mere tool in the hands of the French Government, and led always by mercenary assurances of friendship."

[1] Lodge, *Washington*, II, 209, 210.

In spite of this, however, and in justice to his memory, it is to be remembered that no statesman ever lived who so successfully overcame the disheartening and disappointing vicissitude of a political career. He returned from France in disgrace, having retrograded to the ranks of an ordinary citizen, with few staunch friends and without place or party. Yet his patient indomitable will overcame all obstacles, and, re-entering political life, he gradually rose step by step from the lowest ranks of political preferment in his own State to that of Governor, to eventually fill the highest place in the gift of the American people as their chief Executive. Surely there must have been something beyond the ordinary man in capabilities so marked to work out, in the face of disaster, a career so distinguished. Even the names of some of our Presidents are unknown to the multitude, but that of James Monroe is a household word to the American at heart.

The words and music of *l'Hymne à la Liberté* or *Chant de Guerre (Marseillaise)* were written by Rouget de Lisle at Strasbourg in April 1792, and first publicly played on the Place d'Armes on the 29th, by the musicians of the national guard on the occasion of a parade for the enrolment of volunteers. Rouget de Lisle was almost unknown at Marseille; but on the evening of June 22nd following, a young patriot from Montpellier, François Mireur, sang it before a crowded meeting of the Friends of Equality and the Constitution at Marseille with such dramatic effect that he received a tremendous ovation, thousands of copies of the hymn, which thenceforth was to be known as the *Marseillaise*, being freely printed and distributed.[1]

So it was with the Monroe doctrine. It was first set to music and sung as a national anthem by President Monroe,

[1] Jean Lombard, *Un volontaire de 1792*, p. 80.

and thenceforth became known as the Monroe doctrine, although it no more originated with him than the *Marseillaise* originated at Marseille.

But whether the Monroe doctrine had its origin with President Monroe or not, to-day makes little difference. That is a question that more concerns the historian and the student than the live citizen. Whatever the truth may be, the national child was so christened, and no one will be able to discard the name of its recognised parent. It was born under the paternal presidential roof of James Monroe, was loudly acclaimed as his own legitimate offspring, has always been so received and accepted, and during the advancing progress and life of the great American Republic will so continue to be.

As Goldwin Smith says, "It may be that Monroe was not the sole or the first promulgator of the doctrine, but by him it was propounded most clearly and at a juncture which gave it practical force."[1]

There are innumerable instances when the giant intellects of the day subscribed themselves at the shrine of territorial inviolability and national greatness, but they were as a rule the expressions of men in private life or in the shape of personal or diplomatical communications, and consequently did not get before the public eye. It was therefore, but natural, when the President declared his policy, it should be regarded and received as the proclamation of a new creed. It came as a new declaration of faith from the pen and mouth of the head of the now rapidly rising nation, which through several wars and successful diplomacy was becoming self-reliant. It was an official manifestation of the foreign policy of the United States to all the world, and taking the occasion and source from whence it came, it conveyed lasting conviction to the minds of the people as being the outcome of the statesmanship and sagacity

[1] *The United States*, 176.

of President Monroe himself. In this way the foreign policy of the United States became, not only known as the Monroe doctrine, but Monroe, in the minds of the American people, was and still is regarded as its author. All credit is due to him for the dignified and courageous declaration which, after all, is sufficient in itself to answer every requirement and contingency through which we may pass as a nation. Whether its principles were old or new, whether it first saw the light of day in the gifted talents of one colonial patriot or another, whether it was aimed to accomplish certain limited ends or to expand into unknown splendour, matters little. There it stands in black and white as a record of our rights and duties towards the stranger at our door, and so it will continue.

The Monroe doctrine was a protest in defence of a free people—of all free people--a protest against despotism and anarchy. Many patriots in many lands had already raised their voices in the same protest. Even Canning had publicly done so when, in July 1823, on the occasion of a petition of merchants engaged in the South American trade being presented to him, he said: "We will not interfere with Spain in any attempts she may make to reconquer what were once her colonies, but we will not permit any third Power to attack them or to reconquer them for her."[1]

So, when the question of the attitude of the Holy Alliance and the secret treaty of Verona came before the English Parliament, Brougham, in a speech of extraordinary power, declared that "the principles upon which this band of congregated despots have shown their readiness to act are dangerous in the extreme, not only to free but to all independent States."[2]

[1] Alison's *History of Europe*, p. 306.
[2] *Ibid*, 2 V., p. 273.

No less animated, no less inspired, was the protest raised by de Chateaubriand in the French Chamber of Deputies: "It is Great Britain," he said, "which simply at Verona has raised its voice against the principles of intervention; it is that country which alone is ready to take up arms to defend a free people; it is it which denounces an impious war at variance with the right of nations."[1]

The same patriotic fervour is found as far back as 1792, in the decree of April 29th, wherein the National Assembly of France declared that "the French nation, faithful to the principles consecrated by the Constitution not to undertake any war for the purpose of conquest, and not to use its forces against the liberty of any people, will only take up arms for the defence of its liberty and independence; that the war which it is obliged to undertake is not a war of one nation against another, but the just defence of a free people against the unjust aggression of a King."

During the debate in Congress in 1826 on the proposed mission to Panama—only three years after the declaration of the Monroe doctrine—James Buchanan, in referring to it, said: "The declarations contained no pledge to any foreign government. . . . It left us perfectly free. . . . We have ourselves grown by standing alone and pursuing an independent policy. This path has conducted us to national happiness and national glory. Let us never abandon it."[2]

When, in 1852, Washington Kossuth sought an interview with Henry Clay, then in feeble health, to try to persuade him to use his influence in favour of the United States intervening in behalf of the Hungarian revolutionists, Clay replied: "By the policy to which we have adhered since the days of Washington we have prospered beyond precedent; we have done more for the cause of liberty in the world than

[1] *Ibid*, p. 275.
[2] *Works of James Buchanan*, IV., 190, 206.

arms could effect; we have shown to other nations the way to greatness and happiness. . . . . Far better is it for ourselves, for Hungary, and for the cause of liberty, that adhering to our wise pacific system, and avoiding the distant wars of Europe, we should keep our lamp burning brightly on this western shore as a light to all nations, than to hazard its utter extinction amid the ruins of fallen and falling republics in Europe."[1]

The Monroe doctrine not only means liberty and a free people—it means also self-protection, protection of American territory, of American liberty, of American commerce, and of American industry. There is nothing new in this doctrine, and shorn of surrounding circumstances and the somewhat dramatic occasion of its announcement, it appears but the doctrine on which every successful government has built up its population and prosperity. A hundred years—a century of such progress and development as the last—has necessarily worked many changes, but the principles embodied by President Monroe in his message of 1823 have never ceased to be applicable, as shown in the physical distribution and acquirement of territory, the alteration and changes in forms of government and the establishment of new and independent States. One might as well attempt to overthrow our Constitution as to overthrow the popular faith and reliance of the American people in the Monroe doctrine. That doctrine they have had for nearly a century, and howsoever it may be applied to-day—whether abroad or at home—whether aimed at the restraint of acts of inhumanity in foreign lands or on our own continent—whether for peace or for war—the great mass of American citizens claim it as their birthright, and will never willingly accede to its withdrawal or abrogation. It has in the past and for years to come will form a doctrinal plank of Presidential platforms, and be the rallying point at which the

[1] *Moore*, 6, p. 52.

great mass of the people worship. The man would indeed have to be something more than human who could successfully eradicate from the hearts of the American people their faith in this doctrine—a faith that knows not the why nor the wherefore, but blindly and with divine confidence trusts in its sacred and beneficent power to protect and do justice unto others as you would have them do unto you.

As Francis B. Loomis says, the Monroe doctrine is the fervent expression of an American policy—one that has grown to be part of the life and thought of the nation. Its strength lies to a considerable extent in its flexibility and in the wisdom which causes us to refrain from attempting to define it with precision and to draw it within specified metes and bounds.[1]

The Monroe doctrine is founded on the principle of maintaining our free republican form of government.

In the Venezuela controversy, President Cleveland showed the spirit of the statesman in his dignified insistence of the principle of the Monroe doctrine. He called the attention of Congress particularly to a communication received from the British Prime Minister, which was devoted exclusively to observations on the Monroe doctrine, claiming that in the present instance a new and strange extension and development of that doctrine was insisted on by the United States, and that it was inapplicable to the state of things in which we live at the present day. President Cleveland, to his great credit, never flinched, but facing the issue squarely, stood his ground with creditable firmness and ultimate success. Without attempting extended argument in reply to these positions, he said "it may not be amiss to suggest that the doctrine upon which we stand is strong and sound, because its enforcement is important to our peace and safety as a nation, and is essential to the integrity of our free institutions and the tranquil maintenance of our distinctive form

[1] *The Making of America*, 2 V., 185.

of government. It was intended to apply to every stage of our national life, and cannot become obsolete while our Republic endures."[1]

What could be clearer—more concise—than this? Here in a nutshell he embodied three great fundamental principles of the Monroe doctrine, and insisted on its enforcement:—

1. It is important to our peace and safety as a nation.
2. It is essential to the integrity of our free institutions.
3. It is essential to the tranquil maintenance of our distinctive form of government.

In what does our political system consist unless it is to see that life and property are secure and under the control of some regularly constituted representative form of government?

"The preservation of the sacred fire of liberty and the destiny of the republican model of government," declared Washington in his inaugural speech, "are justly considered as deeply, perhaps as finally, stated on the experiment intrusted in the hands of the American people."[2]

Take for illustration the declaration to defend our political system. Is that not broad enough to justify our interference and intervention on the ground of humanity in order to stay the effusion of blood and stop anarchy? What is our political system for unless to accomplish this where its existence involves the rights and interests of the United States as a nation? Surely freedom and liberty were not the outcome of our independence any more than they are those of any other free people simply to be selfishly enjoyed at the sacrifice of national honour and dignity. The United States did not come into existence merely as a passive irresponsible State, but having fought for and established a political system based on principles of

[1] *Special Message*, Dec. 17th 1895.

[2] Sparks, *Writings of Washington*, 12 V., 4.

liberty, equality, and justice, it behoves that nation, not only to maintain those principles within its borders, but to see that they are not over-run and trampled in the dust in other free States where the people have got beyond control, and where fire and destruction are devastating the country.

What was the political system to which Monroe referred that the United States was ready to defend? It is found in the language of Secretary Seward, when, in a letter to our Minister to Costa Rica in 1862, he said: "Americanism is one interest, and ought to be one sentiment throughout this Continent. Republicanism is one interest and has one destiny for the weal or woe of mankind throughout, not only this continent, but throughout the world."

The protection of our political system was, and long had been, the one undisputed principle around which all parties rallied, and regarding which there never was a dissentient voice.

In a letter, dated August 4th 1820, Jefferson, in referring to the newly-appointed Portuguese minister to Brazil, recommends the importance of the American nations "coalescing in an American system of policy totally independent of and unconnected with that of Europe."[1]

The Monroe doctrine is founded on our obligation to ourselves, to civilisation, and to humanity.

Self-preservation of our national integrity—of the stability, growth, and expansion of the United States—pervades the whole of the Monroe doctrine. It was not a pledge, not a guarantee, but only the expression of executive policy placed on the pillar of irrefutable right. Stripped of all verbiage, the keynote of Monroe's message is found in two sentences: "It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defence. . . . To the defence of our own, which has been achieved

[1] Randall's *Jefferson*, III, 472

by the loss of so much blood and treasure, and matured by the wisdom of its most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted." This it was that the message sought to accomplish—the defence of our own—and this is what every nation in the world's history has sought to do. No one—much less a statesman—can complain of or criticise the wisdom or soundness of such a doctrine. That it was so understood, and that it was in strict conformity with our duty and interests, is amply proven by the statements of such statesmen as Webster and Clay. "The message was intended to say," declared Webster, "what it does say, that we should regard such a combination (of the Allies) as a danger to us. . . . This declaration must be considered as founded on our rights, and to spring mainly from a regard to their preservation."

"If, indeed," said Clay, "an attempt by force had been made by allied Europe to subvert the liberties of the southern nations on this continent, and to erect, upon the ruins of their free institutions, monarchical systems, the people of the United States would have stood pledged, in the opinion of their executive, not to any foreign State, but to themselves and their posterity, by their dearest interests and highest duties, to resist to the utmost such attempt."

If we intervened in Cuba, it was because we felt that the rights and interests of the United States were jeopardised, and acting on the same broad principle laid down by Monroe, that these were ever of the first importance, we only put into execution the cardinal rule of his doctrine. That this is true one has only to refer to the messages of President McKinley.

"Intervention," he declared, "upon humanitarian grounds has been frequently suggested, and has not failed to receive my most anxious and earnest consideration. . . . If it

should hereafter appear to be a duty imposed by our obligations to ourselves, to civilisation and humanity to intervene with force, it shall be without fault on our part, and only because the necessity for such action will be so clear as to command the support and approval of the civilised world."[1]

"In the name of humanity, in the name of civilisation, in behalf of endangered American interests which give us the right and the duty to speak and to act, the war in Cuba must stop."[2]

This was but following out what President Grant, in 1870, in a special message to Congress in regard to Cuba, said: "The contest has at no time assumed the conditions which amount to war in the sense of International law or which would show the existence of a *de facto* political organisation of the insurgents sufficient to justify a recognition of belligerency. . . . . Whatever may be the sympathies of the people or of the government of the United States for the cause or objects for which a part of the people of Cuba are understood to have put themselves in armed resistance to the government of Spain, there can be no just sympathy in a conflict carried on by both parties alike in such barbarous violation of the rules of civilised nations and with such continual outrage upon the plainest principles of humanity. . . . . We cannot discriminate in our censure of their mode of conducting their contest between the Spanish and the Cubans; each commits the same atrocities, and outrage alike the established rules of war."[3]

The United States has been unable even to resist that tendency, so strong in every proud and liberty-loving people, to express herself strongly in cases of misgovernment, to use her influence on behalf of oppressed peoples.

[1] President McKinley's Annual Message, Dec. 6th 1897, Moore, 6 V., 139.

[2] President McKinley's Special Message, April 11th 1898, *Ibid.*, 223.

[3] Moore, 6 V., pp. 63, 64.

And Secretary Olney did not hesitate to declare that there is no reason "why the United States should not act for the relief of suffering humanity and for the advancement of civilisation wherever and whenever such action would be timely."[1]

People forgot that the Monroe doctrine includes the protection of the rights and interests of the United States. This being one of the principles of the doctrine, it follows that whenever anything arises involving the rights and interests of United States citizens, they can properly seek protection under that doctrine, or rather that the doctrine is sufficiently pliable to include the circumstances of every case involving the foreign policy of the United States.

Theodore Roosevelt, while President, was the real exponent of the Monroe doctrine in its pristine glory. No President was more fully alive to its magnificent scope and possibilities. Possessing as he does that indomitable courage and independence of action whenever he believes in a cause, he achieved for the United States more than any one man during the century of our political existence in the practical application of the doctrine of Monroe. In every act of his foreign policy he never forgot the underlying principle of the rights and interests of his country, and, guided by this great maxim, he extended the grandest and most lasting band of peace the world has ever known by cementing the commercial interests of all nations in the mutual advantages of the Panama Canal as a purely American accomplishment. There are many theories of the ex-President to which I and many others cannot lend approval; but so far as his practical application of the Monroe doctrine is concerned, it was without parallel in the history of our country.

In the Isthmus of Panama we were dealing with a government of an irresponsible bandit who had made

[1] Colquhoun, *Greater America*, 397, 398.

himself dictator, and where for over half-a-century revolution and bloodshed had been rampant, overleaping all restraint. The eyes of every foreign nation rested with covetous greed on that small strip of land. Whose interests could bear any comparison with those of the United States in that territory, and in securing for ourselves predominant interests and privileges in that inter-oceanic waterway? As President Roosevelt truthfully says: "No one connected with the American Government had any part in preparing, inciting or encouraging the revolution. . . . . By the unanimous action of its people and without firing a shot, the State of Panama declared themselves an independent republic. The time for hesitation on our part had passed. . . . . From the beginning to the end our course was straightforward and in absolute accord with the highest of standards of international morality. Criticism of it came only from misinformation or else from a sentimentality which represents both mental weakness and a moral twist. To have acted otherwise than I did would have been on my part betrayal of the interests of the United States, indifference to the interests of Panama, and recreancy to the interests of the world at large." [1]

It cannot in the long run prove possible, he says elsewhere, for the United States to protect delinquent American nations from punishment for the non-performance of their duties, unless she undertakes to make them perform their duties. People may theorise about this as much as they wish, but whenever a sufficiently strong outside nation becomes sufficiently aggrieved, then either that nation will act or the United States Government itself will have to act.

When he interfered in Santo Domingo he saved the United States from having serious difficulties with several foreign Powers, and by protecting the rights and interests of the country, put into force the principles of the Monroe

[1] Roosevelt, *Autobiography*, 564, 565, 566.

doctrine. As he tersely puts it: "There was always fighting, always plundering; and the successful graspers for governmental power were always pawning ports and custom houses, or trying to put them up as guarantee for loans. . . . . At one period one government was at sea in a small gunboat, but still stoutly maintained that it was in possession of the island and entitled to make loans and declare peace or war. The situation had become intolerable by the time that I interfered."[1]

"In asserting the Monroe doctrine," he said in one of his annual messages, "in taking such steps as we have taken in regard to Cuba, Venezuela and Panama, and in endeavouring to circumscribe the theatre of war in the Far East, and to secure the open door in China, we have acted in our own interest as well as in the interest of humanity at large."[2]

President Roosevelt has been censured for his action in connection with fomenting the severance of the Republic of Panama from the Republic of Colombia, and the undue haste with which the United States recognised the new Republic, and secured treaty rights by which the building of the Panama Canal was assured; but the time when and the circumstances under which the Government shall recognise the rights of belligerency, rest alone in the discretion of the Executive and Congress. The principles of the Monroe doctrine justify interference whenever it is our policy to do so. As long ago as in 1869, President Grant, in his annual message, said that a nation is its own judge when to accord the rights of belligerency, either to a people struggling to free themselves from a government they believe to be oppressive, or to independent nations at war with each other.

Whatever writers and theorists may say to the contrary, the United States has, through the necessity of defending

[1] Roosevelt, *Autobiography*, 548.
[2] Annual Message, Dec. 6th 1904.

the Monroe doctrine against the interference of European nations, radically been forced into the position of a sort of good faithful watchdog over the internal social and political order of the sister Republics on the Western Hemisphere; for, as President Roosevelt has forcibly said: "It is a mere truism to say that every nation, whether in America or anywhere else, which desires to maintain its freedom, its independence, must ultimately realise the right of such independence cannot be separated from the responsibility of making good use of it."[1]

"All that this country desires," he said on another occasion, "is to see the neighbouring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our hearty friendship. If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in the general loosening of the ties of civilised society, may in America, as elsewhere, ultimately require intervention by some civilised nation, and in the Western Hemisphere the adherence of the United States to the Monroe doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power."[2]

"No independent nation in America need have the slightest fear of aggression from the United States. It behoves each one to maintain order within its own borders, and to discharge its just obligations to foreigners. When this is done, they can rest assured that, be they strong or weak, they have nothing to dread from outside interference."[3]

[1] Annual Message, Dec. 6th 1904.
[2] Annual Message, Dec. 6th 1904.
[3] Message, Dec. 2nd 1902.

The Monroe doctrine is a protest against national dishonour by neighbouring States; that they should conduct their political institutions on broad moral principles, with justice towards all and cruelty towards none, thus assuring those blessings and that prosperity that a well-governed and free independent people can alone enjoy. In the new and intimate relations existing between the United States and the Spanish-American Republics—the commercial and social ties—no one country can defy all obligations of right and justice to its citizens without calling forth a protest on the part of a neighbouring State. The natural and friendly intercourse existing has produced certain moral unwritten obligations that have all the force of written laws, and, therefore, even a free country cannot ignore the consequences of its own acts when hostile or inimicable to the principles of natural right and justice. In other words, no State, any more than an individual, is to-day permitted to do precisely as it likes even within its own territorial limits, for States, like men, are under control.

When I speak of the Spanish-American States I refer to lawfully-constituted States with something more than a *de facto* government born in revolution, sustained by brute force, and existing in defiance of every constitutional guarantee. Governments that spring into existence as one revolution follows another in quick succession, and which are domineered over by a savage in soldier's clothing under an autocratic and dictatorial regime, cannot be classed among the Spanish-American States, much less among the family of civilised nations. Their cruel ideas and disorderly forms of government keep them beyond the pale of recognition, and it is precisely this anarchical lawless condition, when its continuance becomes a menace to the property and lives of its inhabitants, that justifies the United States in interfering in the name of humanity.

In deploring the instability of the Spanish-American

Republics, Buchanan, when Secretary of State, said "so long as it should be in the power of successive military chieftains to subvert the governments of those Republics by the sword, their people could not expect to enjoy the blessings of liberty, and anarchy, confusion, and civil war must be the result."[1]

When the Mexican people become capable of exercising self-control, then, and only then, will a system of political government like our own be possible. This should come from within, but if necessary it will come from without; but that it will come is merely a question of time. Situated as it is, bordering our own territory, the rights and interests of the United States in settling this problem are paramount.

In Mexico we have but a repetition of the condition of things that existed in Santo Domingo. It is absurd to talk about constitutional government in a country where the great mass of the population are either turbulent Indians or ignorant, indolent, and arrogant creoles without the first rudiments of education, who live on the most scanty food and roam about as independent armed bandits, ever ready to follow any revolutionary leader who will promise food and plunder. There has never been a really constitutional government in Mexico—that is, a goverment that has been in reality anything more than under the military dictatorship of some revolutionary adventurer—so that when it comes to backing up one set of revolutionists, because they call themselves constitutionalists, against another band of revolutionists who happen through open murder to be in possession of the seat of power, the whole situation becomes a political farce. Better either to leave them alone to settle their differences between themselves unaided, or, in the name of humanity, put a stop to lawlessness that is devastating one of the fairest of lands, and establish a constitutional

[1] Moore, 6 V., p. 436.

government, not only in name, but in fact. The day may come when this latter alternative will become necessary, but before that is finally accomplished the blood of a hundred thousand men may dye the sands between the Rio Grande and the City of Mexico.

President Wilson said: "We have gone down to Mexico to serve mankind if we can find a way." Would it not have been wiser and more consistent with the principles of our foreign policy first to have found the way and then to have gone down?

This, however, is but in keeping with that sense of national humiliation and dishonour that attended our naval excursion into Mexican waters, when, after months and months of fruitless waiting and indecision, the United States abandoned its helpless refugees to seek shelter and protection on board British vessels, under the British flag.

To quote from the *Paris Herald*, May 6th 1914:—

"A man standing on the highest deck suddenly took "from his pocket a large British flag. He unfurled it and "flung it high above his head. 'I am an American,' he "shouted, 'born and reared. As a child at school I was "taught and believed that the American flag was the "emblem of strength and safety. Now I tell you I am "ashamed of my country!'"

How different would have been the incisiveness of such a man as President Roosevelt at such a crisis. "Nine-tenths of wisdom," he justly says, "is to be wise in time and at the right time; and my whole foreign policy was based on the exercise of intelligent forethought and of decisive action sufficiently far in advance of any likely crisis to make it improbable that we should run into serious trouble."[1]

With our present foreign policy—how can we expect, in the words of Washington, to "be a nation—be Americans!"

[1] *Autobiography*, 548, 549.

The Monroe doctrine was conceived in the spirit of peace and not of war; it was founded in friendship and goodwill towards all free people and on humanitarian grounds.

The suggestions from Canning to Rush were made with a view to prevent war and secure peace, and Jefferson was clearly of Canning's opinion that such a declaration would prevent instead of provoking war, thus showing the pacific purpose with which the Monroe doctrine was originally formulated.

The doctrine declared by Monroe was a doctrine of peace, and if it can be maintained as such, the purpose and glory of its original conception will continue as the golden rule of American policy. It was based on the idea of freedom from European interference or intermeddling, and while formerly unrequired by European Powers and forming no link in the chain of International law, it will undoubtedly be respected, and justly so as long as the United States affords no just ground of complaint. To live up to this standard, however, the United States must see that the free States of this hemisphere live in peace and goodfellowship, and that a stable peace prevails among them, uniting this Continent in an international fellowship. We cannot defy interference where interference is just and in order to redress a wrong or enforce a debt; and if we are to maintain the Monroe doctrine in all its pristine glory, then it behoves us, through every pacific and diplomatic means, to enforce on the part of our sister Republics a strict and faithful obedience to their duties and obligations as honourable States. These means are those of peace and not of war, and it was to insure the harmony, development and commercial and industrial advancement of the North American States that the Monroe doctrine was promulgated. Unfortunately, like many great truths, it has been often misconceived and misinterpreted. It has

been used as an aggressive, offensive, threatening menace to Europe against interference, whether just or unjust; as bristling with the sound of war; as a battle-cry of patriotic defiance. European aggression on our Continent is to be deplored, perhaps frustrated, but this is not to be accomplished by an appeal to arms in forced opposition, but by the adoption and enforcement of a wise and judicious policy of moral suasion at home among our lesser nations that will reduce them from belligerent States to peaceful Powers, and thus do away with all cause for foreign interference.

This is the spirit of true democracy. In Europe the militant system is predominant, while in the United States the peaceful commercial sentiment guides and rules the land. But to insure peace, stable government must prevail, and it was to guarantee Europe against the breach of this peace that we declared against European interference. We cannot permit our sister States to repudiate their debts, or struggle in endless rebellion; we cannot allow the wanton destruction of life and property to continue, and a condition of unrestrained anarchy to exist, and then complain against the protest of the interference of another foreign nation because we are remiss in our own obligations to see that this Continent is not stained by the useless shedding of human blood. The Monroe doctrine was not intended to be and is not hostile to any nation. It was not and is not a doctrine of defiance. It was not intended as an aggressive policy. It was aimed against war and unjust aggression at home. It said to Europe, let these free North American States live in peace, and if you will not let them, then we will see that you do; but we cannot maintain a part of the doctrine and injure the rest. Whether this policy was wise or unwise, it is now too late to think of changing it. It has become so firmly embodied in the popular mind that no administration would be strong enough to eradicate it from the heart of the people; it

has become a priceless political heirloom, and, as a writer forcibly says, is considered to be the equivalent of the declaration of independence.[1]

Those who knew him can testify to the noble qualities of Carl Schurz as a patriot and a statesman; future students of American history will learn to appreciate his life-long labour in the cause of liberty. No one ever had a better or broader conception of the Monroe doctrine than he. "Surely," he said, "I want this Republic to be a great world-Power—a greater world-Power than it is now, or than it can be made by armies and navies ever so gigantic. The way to accomplish this is simple: let this Republic present to the world the most encouraging example of a great people governing themselves in liberty, justice, and peace, and let its dealings with all other nations, great and small, strong and weak, be so obviously just and fair, so patient and forbearing, so mindful not only of their rights, but also of their self-respect, so free from all arrogance or humiliating assertion of superior strength, that nobody can doubt its generous usefulness, and that, whenever a mediator is wanted for the adjustment of international differences, this Republic will be looked up to as the national arbiter. Then it will be in the noblest sense a great world-Power—indeed, the strongest world-Power mankind has ever known."[2]

"It (the Monroe doctrine) is simply a step, and a long step, towards assuring the universal peace of the world by securing the possibility of permanent peace on this hemisphere. . . . Our people intend to abide by the Monroe doctrine, and to insist upon it as the one sure means of securing the peace of the Western Hemisphere."[3]

"As respects controversies between the States of this hemisphere, the attitude of the United States has been repeatedly made clear. We wish to maintain equally

[1] Coly, *Promise of American Life*, 291.

[2] Bancroft, *Carl Schurz*, 6 V., 373. [3] Roosevelt, Annual Message, 1901.

friendly and close relations with all. . . . The Government of the United States has, on many occasions, expressed its strong desire that peace and harmony shall prevail among the countries with which it holds friendly relations, and especially among the Republics of the American continents."[1]

But is it not time to awake, as Hamilton declared to the people of New York, from the deceitful dream of a golden age, and to adopt as a practical maxim for the direction of our political conduct that we as the other inhabitants of the globe are yet remote from the happy empire of perfect wisdom and perfect virtue?[2]

And on another occasion he said, "the rights of neutrality will only be respected when they are defended by an adequate power. A nation despicable by its weakness forfeits even the privilege of being neutral."[3]

In Jay's judgment, the people of America, as far back as in 1787, considered union and a good national government as necessary to put and keep them in such a situation as, instead of inviting war, would tend to repress and discourage it.[4]

And while the Monroe doctrine is a doctrine of peace and not of war, it is not to be forgotten, as Washington himself declared to Congress, that to be prepared for war is one of the most effectual means of preserving peace.[5]

Whatever personal divergent views may be maintained on the subject, it must be generally admitted that the policy thus announced and long invoked by the United States is not a policy of passive resistance. It is a policy that requires an armed force ready in the moment of necessity to be called; in other words, that the surest steps to security and peace lie in a well-trained and efficient military and naval force. President Roosevelt well said that the navy offers us the only means of making our insistence upon the

[1] Hay, 6 V., 603-4. [2] I Federalist, 40. [3] I Federalist, 75.
[4] I Federalist, 27. [5] Speech to Congress, Jan. 8th 1790.

Monroe doctrine anything but a subject of derision to whatever nation chooses to disregard it.[1] This, however, was but repeating what Secretary Frelinghausen said nine years before. Were the United States, he declared, to assume an attitude of dictation towards the South American Republics, even for the purpose of preventing war, the greatest of evils, or to preserve the autonomy of nations, it must be prepared by army and navy to enforce its mandate.[2]

President Roosevelt has been criticised and held to task for these sentiments and abused for his aggressive belligerent ideas. But what would his critics have to say did they but know that in every patriotic sentiment he uttered, President Roosevelt only re-choed the words of Washington, who, in his speech to Congress, December 3rd 1793, said :—

"I cannot recommend to your notice measures for the fulfilment of our duties to the rest of the world without again pressing upon you the necessity of placing ourselves in a condition of complete defence, and of exacting from them the fulfilment of their duties towards us. The United States ought not to indulge a persuasion that, contrary to the order of human events, they will for ever keep at a distance those painful appeals to arms with which the history of every other nation abounds. There is a rank due to the United States among nations which will be withheld, if not absolutely lost, by the reputation of weakness. If we desire to avoid insult, we must be able to repel it; if we desire to secure peace, one of the most powerful instruments of our rising prosperity, it must be known that we are at all times ready for war."[3]

And three years later Washington repeated that, to secure respect to a neutral flag, requires a naval force organised and ready to vindicate it from insult or aggression. . . .

[1] Moore, 6 V., p. 595. [2] Moore, 6 V., p. 40.
[3] Sparks, *Writings of Washington.*

These considerations invite the United States to look to the means, and to set about the gradual creation of a navy.[1]

Richard Olney well states the change of American sentiment as to the policy of enforcing the Monroe doctrine. "Force," he says, "is the final arbiter between States as between individuals, and merit, conspicuous and well-founded in International law, is of small value unless supported by adequate force."

But it should be an interference at first of a peaceful, admonitory nature without threat or the suggestion of force. If these means, however, prove ineffectual, then moral suasion should be laid aside for the sword. In other words, he who presides in the White House over the destiny of the American people, with the dove of peace in his right hand, preaching the Monroe doctrine, must hold a loaded gun in his left; he must, like the Pilgrim Fathers, not only be able to pray at night, but to shoot by day.

C. A. HERESHOFF BARTLETT.

II.—DISRAELI AND THE LAW.

MR. G. W. E. RUSSELL, in one of his lively essays on Disraeli, states that, when his statue was erected in Parliament Square, a cynical politician described him as "Twice Prime Minister of England, and once a scrivener's clerk." The last part of the description was an offensive way of referring to Disraeli's early connexion with the law. Like other eminent statesmen, he devoted his attention for a portion of his early life to legal study and avocations, and doubtless benefited in later life by the knowledge which he acquired. Disraeli's father, conscious of the exuberant personality of his brilliant son, early became anxious to

[1] Speech to Congress, December 7th 1796, Sparks, *Writings of Washington.*

see him fixed in some sphere that would concentrate his energies, and afford him a career. In November 1821, the future Prime Minister, at the age of 17, was articled to Messrs. Swain, Stevens, Maples, Pearce and Hunt, of Frederick's Place, Old Jewry. The firm was the most eminent in the City, except Freshfields, of whom, says Disraeli, they were the honoured rivals, and the partners divided fifteen thousand pounds a year between them, though in unequal portions. Disraeli, who, even at that early age, dreamed of Parliament, had some scruples about the career mapped out for him. But his father kept reminding him of Philip Carteret Webb, who was the most eminent solicitor of his own boyhood, and who was a Member of the House of Commons.

It was the intention of Disraeli *père* that his son should become a partner in the firm, and Benjamin was at once admitted to an important position in the office. His business was to be the private secretary of the busiest of the partners.

> " He dictated to me every day his correspondence," says Disraeli, "which was as extensive as a Minister's, " and when the clients arrived I did not leave the room, " but remained, not only to learn my business, but " to become acquainted with my future clients. They " were in general men of great importance—bank di- " rectors, East India directors, merchants, bankers. " Often extraordinary scenes, when firms in the highest " credit came to announce and prepare for their im- " pending suspension; questions, too, where great " amounts were at stake; the formation, too of com- " panies, &c., &c. It gave me great facility with my " pen and no inconsiderable knowledge of human " nature."

The routine of a solicitor's office, however, was not Disraeli's true sphere, and he gradually came to realise

it. He left the office of Messrs. Swain and Company after three years' experience of it, and his brother, James Disraeli, succeeded to the vacant stool, and ultimately became a solicitor. In 1824, after leaving Frederick's Place, Disraeli entered himself as a member of Lincoln's Inn. While keeping terms he seems to have read in the chambers of his uncle, Mr. Basevi, a barrister and conveyancer. Mr. Basevi was called at Lincoln's Inn in March, 1819, and first had chambers at 16, Old Square. In 1823 he appears in the *Law List* as at 19, Old Square, where he remained for many years, and where Disraeli must have attended. Sir William Fraser[1] says that he was informed by one who was a pupil of Basevi later that Disraeli always declared that he did not intend the law to be his profession, that he intended to make his name as a statesman, and that he constantly harped upon that string. Nor were the dull chambers of a Lincoln's Inn conveyancer likely to increase his inclination to the profession. It is not surprising, therefore, to find that, after keeping nine terms, he abandoned the idea of being called to the Bar. In November 1831, he removed his name from the books of the Inn, and by a curious coincidence it is said, he did so on the same day as Mr. Gladstone, who was also a member of the Inn. He gave as his reason for this step that his health did not permit him to follow the profession of the law.

In later life Disraeli was inclined to speak disparagingly of the Bar. His contemptuous references to it in his famous attack upon Mr. Austin, Q.C., were quoted in a recent issue of this Magazine.[2] In *Vivian Grey*, which was written before he entered at Lincoln's Inn, he describes the Bar as a career in a well-known passage:—

> "The Bar—pooh! law and bad jokes till we are
> "forty; and then with the most brilliant success, the

[1] *Disraeli and his Day*, p. 285.

[2] *Law Magazine and Review*, February, 1914.

"prospect of gout and a coronet. Besides, to succeed "as an advocate, I must be a great lawyer, and to be "a great lawyer, I must give up my chance of being a "great man."

His description of Circuit is not so well known:—

"This Circuit is a cold and mercantile adventure, "and I am disappointed in it. Not so either, for I "looked for but little to enjoy. Take one day of my "life as a specimen; the rest are mostly alike. The "sheriffs' trumpets are playing; one, some tune of "which I know nothing, and the other no tune at "all. I am obliged to turn out at eight. It is the first "day of the assize, so there is some chance of a brief, "being a new place. I push my way into Court through "files of attorneys, as civil to the rogues as possible, "assuring them there is plenty of room, though I am "at the very moment gasping for breath wedged in in "a line of well-lined waistcoats. I get into Court, take "my place in the quietest corner, and there I sit, "and pass other men's fees and briefs like a twopenny "postman, only without pay. Well! 'tis six o'clock, "dinner time, at the bottom of the table, carve for all, "speak to none, nobody speaks to me, must wait till "last to sum up, and pay the bill. Reach home quite "devoured by spleen, after having heard everyone "abused who happened to be absent."

There were two distinguished lawyers to whom Disraeli was greatly attached and indebted in the course of his life. One was Lord Chancellor Lyndhurst, the other was Lord Chancellor Cairns. It was through Lyndhurst's influence that Disraeli first placed his pen at the disposal of the Tory Party, and wrote his brilliant contributions to the *Morning Post*. It was to that distinguished lawyer that he dedicated his *Vindication of the English Constitution* and his novel,

Venetia. Mr. Hutcheon thinks that Disraeli was almost certainly the writer of the article on Lord Lyndhurst, in *Fraser's Magazine*, in 1836. Disraeli was a welcome visitor at Lyndhurst's house, and Lyndhurst went occasionally to Disraeli's home at Bradenham, and seems to have enjoyed a ramble among the Chilterns with his young host. The highly-placed lawyer did all he could to help the early aspirations of the future premier, and secured his warm affection and gratitude. "The world," said Disraeli, in 1870, "has recognised the political courage, the versatile ability, and the masculine eloquence of Lord Lyndhurst, but his intimates only were acquainted with the tenderness of his disposition, the sweetness of his temper, and the playfulness of his bright and airy spirit."

If Lord Lyndhurst was the patron of Disraeli's early life, Lord Cairns was the friend and henchman of his later years. Cairns had not been long associated with Disraeli before the latter formed the highest estimate of his capacity and judgment. When Cairns sat as a Lord Justice of Appeal, between October 1866 and February 1868, it is said by Mr. Atlay that Disraeli used often to send Lord Rowton to consult him during the luncheon interval.[1] When Disraeli became Prime Minister, in February, 1868, he at once appointed Cairns his Lord Chancellor. Lord Chelmsford had been the Chancellor of Lord Derby, Disraeli's predecessor, but it had been arranged, when Lord Derby came into power, in 1866, that Chelmsford was to hold the Chancellorship only temporarily, and that he should in time make way for Cairns. When Disraeli appointed Cairns, however, although his action was in accordance at any rate with the spirit of Lord Derby's arrangement, Lord Chelmsford was extremely indignant, and complained of having been dismissed "with less courtesy than if he had been a butler." He appealed to Lord Derby, who, however, upheld

[1] *The Victorian Chancellors*, ii, p. 309 *n*.

Disraeli's action, and it was not until Cairns appointed Lord Chelmsford's son, Sir Frederick Thesiger, to the bench, that Chelmsford was to some extent appeased. Cairns was again Disraeli's Lord Chancellor in the Administration of 1874, and there was no one on whom the Prime Minister relied so implicitly or regarded with warmer love and esteem. When Disraeli was on his deathbed he asked for his favourite colleague. "I want especially to see Lord Cairns," he said. "He is admirable in council. I want to explain my views to him." It is no slight proof of the essential greatness of Cairns that he secured the admiration and affection of so keen and shrewd a judge of men as Disraeli.

J. A. LOVAT-FRASER.

III.—THE LAW OF ADOPTION IN GERMANY.

WHOEVER has no legitimate descendants may, according to Article 1741 of the German Civil Code, enter into an agreement with another to adopt the latter, and by sentence 2 of this Article such agreement requires the confirmation of the competent Court. The adopter may be a man or woman, married or single. The person adopted may be an infant or a person of full age. The adoption, however, cannot take place under a condition or a time limitation (Article 1742). If such an agreement is entered into containing a condition or a time limitation, then it is a nullity. And Article 1743 enacts that if a person has already adopted a child, this does not prevent him or her adopting another. The adopter must, according to Article 1744, have ended his fiftieth year, and must at least be eighteen years older than the child, that is to say, the child must not be born before the commencement of the eighteenth birthday of the adopter. And by Article 1745 a

dispensation may be obtained from the provisions of the lastly hereinbefore-mentioned Article, but as respects the completion of the fiftieth year, only if the adopter has attained full age, that is to say, has attained the age of twenty-one, or been declared as being of full age. This dispensation is granted by the State to which the adopter belongs, and should the adopter be a German, but not a subject of any State, then the power to grant a dispensation is vested in the Imperial Chancellor. The Government of a State is empowered to make provisions as to dispensations to be issued by such State.

By Article 1746 of the Code, we find that in those cases where a person is married, such person, *i.e.*, whether husband or wife, can only adopt or be adopted with the consent of his or her spouse. No consent, according to paragraph 2 of the same Article, is necessary where the spouse whose consent is required is permanently unable to give the same, or where his permanent residence cannot be ascertained. A legitimate child, according to the provisions of Article 1747 of the Code, can, up to the end of its completing the age of twenty-one years, only be adopted with the consent of its parents; an illegitimate child can, up to the completion of the same age, only be adopted with the consent of its mother. The provisions of Article 1746, paragraph 2 (*supra*), are applicable. On the adoption of a legitimate child the consent of both parents is required, and it is immaterial in whom is vested the parental control, also the aforesaid consent is requisite where the marriage has been dissolved, without taking into consideration which of the spouses has been declared the guilty party. Should a mother adopt her illegitimate child, then she is deemed to have given the consent required by Article 1747 (*supra*) on executing the agreement or contract of adoption. The consent of the persons specified in Articles 1746 and 1747 (*supra*) are, according to Article 1748, paragraph 1, of the Code, to be

made known to the adopter, or to the child or to the Court, which is competent to confirm the contract of adoption; such consent is irrevocable, and paragraph 2 of the same Article provides that the consent cannot be given by an agent, and that should the person whose consent is required be limited in disposing capacity, then the consent of his or her statutory agent is unnecessary, whilst paragraph 3 provides that the declaration of consent requires judicial or notarial verification.

Only married people can adopt a child as a joint child, the principle applicable being *adoptio naturam imitatur* as no one can be the legitimate child of persons who are not married or have not been married.

According to Article 1750, paragraph 1 of the Code, the contract of adoption cannot be entered into by an agent. Should the child not have completed its fourteenth year, then its statutory agent may, with the sanction of the Guardianship Court, enter into the contract, and by paragraph 2 of the same Article, the contract of adoption must be entered into by both parties being present at the same time before the Court, or before a notary, and if the adopter is limited in disposing capacity, then by virtue of Article 1751 he is bound to have not only the consent of his statutory agent, but also the sanction of the Guardianship Court to enter into the contract. Should the adopted child be limited in disposing capacity, then the same conditions as lastly hereinbefore mentioned must be observed.

Then, Article 1752 of the Code enacts, that if a guardian is desirous of adopting his ward, the Guardianship Court should not give its consent, so long as the guardian is in office. If a person desires to adopt his former ward, then the Guardianship Court shall not give its sanction before the guardian has rendered an account of his management, and has proved that the ward's property is still intact. If there is estate, the guardian has *e.g.* to show how the moneys

are invested. The same provisions are applicable when a curator, who was appointed to manage the property of his ward, wishes to adopt his present or former ward.

The confirmation of the contract of adoption, as appears by Article 1753, cannot be given after the death of the child. After the death of the adopter, the confirmation can only be given if the adopter of the child has filed the application for confirmation with the competent Court, or on or after the legal or notarial verification of the contract, has instructed the Court or the notary with such filing. Confirmation after the death of the adopter has the same effect as if the same had been given before his death. And by Article 1754 adoption becomes effectual on confirmation. The parties to the contract are however bound before confirmation. Confirmation can only be refused when some legal requirements for the adoption is wanting. In case the confirmation is absolutely refused, the contract is of no effect. The confirmation, as before stated, may be refused, *e.g.*, when the contract of adoption is given under a condition or time limitation, or, if the adopter has not completed his fiftieth year, or is not eighteen years older than the adopted child. And Article 1755 declares that, should the contract of adoption or the consent of the persons mentioned in Articles 1746 and 1747 (*supra*) be impugnable, then for the purpose of avoidance and for the confirmation of the juristic Act which is sought to be impugned, the provisions contained in Article 1748, paragraph 2, Article 1750, paragraph 1, and Article 1751 (*supra*), shall be applicable.

The validity of the adoption is not affected by the fact that, on the confirmation of the contract it was wrongly assumed that one of the persons mentioned in Articles 1746 and 1747 (*supra*) was permanently not in the position to give a declaration, or that his residence was unknown (Article 1756). By adoption, so paragraph 1 of Article 1757 of the Code enacts, the child acquires the legal position of a

legitimate child of the adopter, and paragraph 2 of the same Article declares that if a child is adopted by a married couple jointly, or if one of the spouses adopts the child of the other spouse, then the child so adopted acquires the legal position of a joint legitimate child of the spouses. The child, according to Article 1758, takes the family name, *i.e.*, the surname of the adopter. Should the child be adopted by a woman, who, in consequence of her marriage, takes another name, then the child takes the family or surname that the woman had before her marriage. In cases coming under Article 1757, paragraph 2 (*supra*), the child takes the family or surname of the man. Unless otherwise provided in the contract of adoption, the child is entitled to add to the new name his former family name or surname.

By adoption no right of inheritance is acquired by the adopter (Article 1759). The object of this Article is to prevent a person adopting another simply for the purpose of succeeding to an estate or to an inheritance of the adopted one. The adopter must further observe the provisions of Article 1760 of the Code, paragraph 1 of which enacts, that the adopter shall, in respect of the estate of the child, and in so far as it is subject to his management by reason of the parental power, draw up an inventory of such estate which must be prepared at the cost of the adopter, and must be lodged or filed with the Guardianship Court. The inventory must be certified by him as being correct, and as containing full particulars of the estate of the person adopted. Should the inventory be insufficient, then the provisions of Article 1640, paragraph 2, sentence 1, are applicable. And, according to paragraph 2 of Article 1760 (*supra*), it is declared that should the adopter not fulfil the obligations imposed upon him by paragraph 1 of this Article, then the Guardianship Court may deprive him of the management of the adopted one's estate. This order, however, can at any time thereafter be

set aside. Article 1640 refers to an inventory to be drawn up by the child's father as to the child's estate, and which is subject to the father's management, and is in existence at the mother's death, or may accrue to the child subsequently thereto, and sentence 1 of paragraph 2 of this Article enacts, that should the inventory which has been lodged be insufficient, then the Guardianship Court may order that the same shall be prepared by the proper authorised authority, or by a duly qualified official or notary.

In case the adopter is desirous of marrying whilst the parental power is vested in him, then Article 1761 of the Code enacts that the provisions of Articles 1669 to 1671 are applicable. Article 1669 contains certain provisions as to a father's duty in case of his re-marriage, with respect to the estate of his child and of which he has the management, whilst Article 1670 enables the Court in certain cases to withdraw from him the management of the child's property; and by Article 1671, the Guardianship Court is entitled during the continuance of the parental power to vary its orders, and particularly those orders which affect the increase, diminution, or the termination of the given security.

The effect of adoption extends to the descendants of the child, but only extends to a descendant if living at the time of the execution of the contract, or to its descendants who may thereafter be born, if the contract is entered into with the descendants who are living at the time when the same is executed (Article 1762). But the effects of the adoption do not extend to the relatives of the adopter. The spouse of the adopter does not become related to the child, and the spouse of the child does not become related to the adopter (Article 1763). Further a relationship by marriage cannot exist between the spouses of the relatives of the adopter and the child.

Then Article 1764 of the German Civil Code declares that the rights and duties arising out of the relationship existing

between the child and his relatives, are not at all affected by the adoption, in so far as the law has not otherwise provided. In this connection the provisions of Articles 1306, 1765, 1766, 1776, 1777, 1786, and paragraph 3 of Article 1899, should be referred to. Articles 1765 and 1766 are more particularly hereinafter referred to. Article 1306 enacts that, should an adopted child desire to marry, then it requires the consent of the person who has adopted it and not that of its own parents, and where a married couple have jointly adopted a child, or in cases where one of the spouses have adopted the child of the other, then the provisions of Article 1305, paragraph 1, sentences 1 and 2, and paragraph 2 of the same Article, are applicable. Should the legal relationship which has been created by adoption be determined, the child's parents do not obtain the right to give the aforesaid consent. Article 1305, paragraph 1, sentences 1 and 2, declare that a legitimate child, until it has completed its twenty-first year, requires the consent of its father to enter into a marriage, and an illegitimate child requires up to the like period and for the same purpose the consent of its mother. In case the father is dead, or he is not entitled to exercise the rights arising out of his fathership according to the provisions of Article 1701, then the mother takes his place, and paragraph 2 of Article 1305, hereinbefore referred to, enacts, that if the father or mother are permanently disqualified to give a declaration, or where their residence is permanently unknown, it is the same as if either of them were dead. Adverting to Article 1701 referred to in Article 1305 (*supra*), it is provided by the former Article that, should the father at the time of the marriage have been aware that such marriage was a nullity, he has no rights arising out of his fathership, and that the parental power, under such circumstances, belongs to the mother. Article 1776 contains a list of the persons who may be called upon to act as guardians, and Article 1777

declares that the father can only appoint a guardian if, at the time of his death, he has the parental power over the child; he has no such right when he is unable to represent the child in matters relating to its person or property. The same provisions apply to the mother, etc., and Article 1786 gives a list of the persons who may refuse to act as guardians, whilst Article 1899 of the Code, after stating that the father and after him the mother are to be preferred as guardians to the ward before the grandfathers, and that parents are not preferred if the ward has been adopted by some person other than the spouse of his father or mother, in paragraph 3 (*supra*) enacts, that should the ward be the offspring of a void marriage, then, in cases coming within the provisions of Article 1701 (*supra*), the father would not be called upon to act as guardian, and in cases falling within Article 1702 the mother would not. This latter article provides that in case the mother was, at the time of the marriage, aware of the invalidity of the same, then she has—as against the child—only such rights as a divorced woman has, who has been declared the guilty party. And, according to paragraph 2, should the father die or should his parental power for some other reason be determined, then the mother has only the right and the duty to care for the person of the child, but she is not authorised to represent it. The guardian of the child, in so far as the mother is bound to care for the child, has the legal position of a supplementary guardian. The provisions of paragraph 2 are applicable, should the parental power of the father be suspended on account of his want of disposing capacity, or by virtue of the provisions of Article 1677 of the Code, which latter Article declares that the parental power of the father is suspended, when the Guardianship Court arrives at the conclusion that the father will, as a matter of fact, be prevented for a long period of time from exercising his parental power. The suspension is determined when the

Guardianship Court considers that the reason for the suspension no longer exists.

Adverting to Article 1765 of the Code, we find that by adoption the natural parents of the adopted child lose the parental power, and that the mother of an illegitimate child is deprived of her right and her duty to care for the child. Should the father or mother of the adopted child be bound to maintain it, then the right and the duty to care for the child's person revives in case the adopter's parental power comes to an end, or is suspended on account of his want of disposing capacity, or according to the provisions of Article 1677 (*supra*). The power of representing the child does not revive again. But should the mother of an illegitimate child have adopted it, then she attains by such act the full parental control or power over her child. It is, however, doubtful whether by the act of adoption the natural parents lose the right of personal intercourse or communication with their child. The legal position of the parents whereby they give their consent to the act of adoption, and thereby also all the personal influence which they might otherwise exercise over the child, should be a sufficient reason for refusing them further intercourse or communication with their child; however, be this as it may, the Guardianship Court has, according to a decision of the Reichsgericht, power to interfere under the provisions of Article 1666 of the German Civil Code in such cases in which, without there being sufficient reason, the natural parents are prevented from having personal communication with the child, and the effect of such refusal would be detrimental or disadvantageous to the child. Adverting to Article 1666, we find that in such cases, where the mental or bodily welfare of the child is endangered by reason of the fact that the father abuses the right which he has to take care of the child's person, or neglects the child, or is guilty of dishonourable or immoral conduct, then the Guardianship

Court must take the necessary steps for the purpose of warding off the danger. The Guardianship Court can order the child to be placed, for the purposes of education, in a suitable family, or send it to some training institution, or place it in a reformatory. In case the father has injured the child by not providing it with proper maintenance, and should it be feared that its future maintenance will be seriously affected, then the management of the child's property can be taken out of his hands, and the right of usufruct withdrawn from him.

Then by Article 1766 of the Code provision is made for the maintenance of the child, and it is thereby enacted that the adopter must not only provide maintenance for the adopted child, but also for such of its descendants, to which the effects of the adoption may extend, and this duty is the adopter's in preference to the natural relations. In cases coming within the provisions of Article 1611, paragraph 2, the adopter occupies the same position as the natural relations in the ascending line. The lastly-mentioned Article (1611), by paragraph 1, declares, that whosoever has become in want or need through his own moral fault or conduct is only entitled to claim the bare necessaries of life, and by paragraph 2 (the paragraph above referred to) it is provided that the claim for maintenance shall be subject to the aforesaid limitation in the case of descendants, parents, and spouses, who have been guilty of such misconduct as enables the person who is compelled to furnish maintenance to withdraw from them their compulsory portion; also the aforesaid limitation applies to the claim for maintenance by grandparents and persons of remoter degree, provided the conditions exist which entitle children to withdraw from their parents the latter's compulsory portion.

The contract of adoption may provide that the adopter shall not have the right of usufruct in the property of the

child, and, as respects the adopter, it may exclude the child's rights of inheritance (Article 1767, paragraph 1). And by paragraph 2 of the same Article it is declared that the effects of adoption cannot otherwise be altered by the contract. This latter paragraph means that the results which have arisen by virtue of law by the act of adoption, and so far as respects the personal relationship, cannot be altered by contract, thus it cannot be agreed that the child shall be brought up in a religion other than that of the adopter. Such an agreement as this would have the effect of rendering the whole contract inefficacious.

Coming to Article 1768 we see that the legal relationship which has arisen from the act of adoption can be determined. The determination thereof cannot be made subject to a condition or time limitation. The determination of the adoption is carried out by a contract made between the adopter, the child, and such descendants of the latter as are effected by the adoption. In the case where spouses have jointly adopted a child, or, in case one of the spouses has adopted the child of the other spouse, then, for the purpose of putting an end to the adoption, the consent of both spouses is necessary, and by Article 1769 it is provided that, after the death of the child, the remainder of the interested parties can, by agreement, determine the legal relationship subsisting between them, and in cases falling within the provisions of Article 1757, paragraph 2 (*supra*), and after the death of one of the spouses, the legal relationship existing between the parties as aforesaid may in like manner be determined. After the death of the adopter no agreement can be entered into to put an end to the adoption, but where a married couple have jointly adopted a child, Article 1749, paragraph 1 (*supra*), and Article 1757, paragraph 2 (*supra*), the death of one of the spouses does not prevent the contract of adoption being

determined. But where one of the spouses has adopted the child of the other spouse, then the death of the last-named spouse does not prevent the contract of adoption being put an end to, whereas, in case of the death of the spouse who has adopted the child, such death may possibly prevent the contract of adoption being determined, as the surviving spouse will in no wise any more be affected by the adoption.

The provisions as to adoption contained in Article 1741, sentence 2 (*supra*), and Articles 1750, 1751, 1753—1755 (*supra*), are applicable in the case where the contract of adoption is determined (Article 1770). And by Article 1771, it is provided that in those cases where persons who are connected by the tie of adoption, marry contrary to the provisions of Article 1311 of the German Civil Code, then the legal relationship existing between them, by reason of the contract of adoption, ceases on their marriage. Should the marriage be a nullity and one of the spouses has the parental power over the other spouse, then by virtue of the marriage this power is forfeited. The forfeiture, however, does not take place if the marriage is a nullity on the ground of some defect in form, and the marriage has not been entered in the marriage register. Article 1311, referred to above, enacts that whoever has adopted another cannot contract a marriage with such other person, or his or her descendants, so long as the legal relationship created between the parties, by reason of the adoption, exists. And lastly, according to Article 1772 of the Code, on the determination of the adoption, the child and such of its descendants as may be affected by the act of adoption lose the right to use the adopter's surname. This provision, however, has no application to the cases mentioned in Article 1757, paragraph 2 (*supra*), should the adoption have been put an end to after the death of one of the spouses.

From the foregoing statement of the law of Adoption, one cannot help but notice how thoroughly and minutely those who have drafted this portion of the German Civil Code have done their work. For a fuller explanation and a more exhaustive study of the law of Adoption, the various legal commentaries on the Civil Code should be referred to where, under each Article in the different commentaries, will be found numerous observations of the respective Authors thereof with references to other Articles of the Code, bearing upon the particular Article under consideration. The law of Adoption plays a most important part in the social life and condition of the German people. Many persons, who are styled Adoption Agents, make a fairly good income by bringing parties together who desire to give children into adoption and those who desire to adopt children. The question naturally arises—Would it be advisable, or possible, to have a law of Adoption in England, based upon and on similar lines as the law of Adoption in Germany? As to the advisability of applying certain provisions of the German law of Adoption, to private agreements made between parties in England who give their children to be adopted and those who adopt the children of others, opinions must vary; but that it is impossible to introduce a law into England, upon similar lines as the German law of Adoption, there cannot be any difference of opinion, as in England we have no Guardianship Court such as exists in Germany. Further, were the legal machinery the same in England as in Germany, for carrying out the provisions of the Articles of the German Civil Code relating to Adoption, would it be advisable to pass a law respecting Adoption on the same lines as the law in Germany? I am decidedly of opinion that it would not. Germany is a bureaucracy, England is not, and having regard to the great difference in the ideas, the method of thought, the manner of reasoning, and the

social life and condition of the two peoples, it is most impracticable to introduce laws into England on similar lines or for similar objects as those in vogue in Germany, or in any other foreign country. To introduce legislation into England, based upon the laws of foreign countries, would, in my opinion, be most dangerous.

HENRY HAPPOLD.

IV.—THE "TITANIC" LITIGATIONS.

ON both sides of the Atlantic litigation concerning the *Titanic* disaster has given rise to legal decisions of the highest importance by the Court of Appeal in England and the Supreme Court of the United States. By a recent judgment the Supreme Court has decided an important point in the conflict of laws: That the foreign owner of a foreign vessel sunk by a collision with an iceberg on the high seas is entitled in the United States to the benefit of the American limitation of shipowners' liability which does not in express terms extend to foreign owners. To English lawyers the main interest of this decision is, that the Supreme Court in construing a Statute couched in general terms has reached an opposite interpretation from that given by the English Courts on the correspondingly general terms of our Merchant Shipping Acts of 1813 and 1854. In the English litigations, which were claims under Lord Campbell's Act, the Court of Appeal has held that there was evidence to support the jury's finding of negligence against the owners of the *Titanic*, and on a question of law has affirmed the decision of Bailhache, J., that a negligence clause added by the owners to the statutory contract ticket issued to steerage passengers under sect. 320 (2) of the

Merchant Shipping Act 1894 is invalid, for lack of the previous approval of the Board of Trade required by that section. If the owners succeed in the appeal, which we understand they have taken to the House of Lords, they will escape liability in England to make compensation for loss of life or personal injury, even if caused by the negligence of their servants, and there will be no need to institute limitation proceedings under English law. In the United States, however, where the claims pending against them run into millions, they have early taken steps to claim the limitation accorded by American law. If they succeed in satisfying the condition of the American Statute, viz., of showing that the accident occurred without their "privity or knowledge," the limitation fund in that country will consist merely of the value of fourteen lifeboats salved from the vessel and the freight pending at the date of the disaster. The total will amount to $97,000. Under the British limitation at £15 per ton the fund would amount to £600,000.

In view of the importance of questions raised in the two countries, some account of the litigations may be of interest.

(1)

Four actions were brought under Lord Campbell's Act against the owners of the *Titanic* in England, by relatives of emigrant passengers on that vessel who lost their lives by the disaster on April 15th 1912. Negligence was averred, *inter alia* in respect of excessive speed, and denied by the defendants, who pleaded in the alternative that they were not liable for the negligence of their servants by virtue of the terms of the ticket under which the passengers were being carried, one of the terms of which was:

> " Neither the shipowner, agent or passage broker shall be
> " liable to any passenger entered under the contract for loss,
> " damage or delay to the passenger . . . . arising through the

"act of God . . . . collision . . . . perils of the sea or of "navigation of any kind . . . . or from causes of any kind "beyond the carrier's control, even although the loss, damage "or delay may have been caused or contributed to by neglect "or default of the shipowner's servants or any other person "for whose acts he would otherwise be responsible."

The Plaintiffs in answer, denied that the exemption clause founded on had been brought to the notice of the passengers, and in the alternative that it was illegal and void under sect. 320 of the Merchant Shipping Act 1894, and of the statutory rules and directions issued by the Board of Trade thereunder.

The jury at the trial having found for all four Plaintiffs on the question of negligence, and for three of them on the question of lack of due notice of the conditions, judgment was entered in these three cases for agreed on damages. In the fourth case, the jury found that the Defendants had given due notice of the exemption clause, but Bailhache, J., holding the clause to be invalid under the Statute, directed judgment to be entered for the Plaintiff in this case also. In all four cases the Defendants appealed, but the Court of Appeal (Vaughan Williams and Kennedy, L.JJ., Buckley, L.J., dissenting) refused to order a new trial and affirmed the decision of Bailhache, J., on the exemption clause. The question of law, which is of the highest importance to shipowners and emigrant passengers, is raised by that clause in the following way. The Merchant Shipping Act of 1894, s. 320 (1) provides:—

"(1) If any person receives money from any person for or in "payment of a passage as a steerage passenger in any "ship, or of a passage as a cabin passenger in any emigrant "ship, proceeding from the British Isles to any port out "of Europe and not within the Mediterranean Sea, he "shall give to the person paying the same a contract ticket "signed by or on behalf of the owners, charterer or master of the ship and printed in plain and legible characters.

"(2) The contract ticket shall be in a form approved by the "Board of Trade and published in the *London Gazette*, "and any directions contained in that form of contract not "being inconsistent with this Act shall be obeyed as if set "forth in this section."

The revised form of ticket now in use, which was approved by the Board of Trade on 15th February 1908, and published in the *London Gazette* of 18th February 1908, came into force on March 1st of that year.[1] It is entitled "Steerage Passengers' Contract Ticket," and on the left hand margin contains this notice: "These directions, and the notice to steerage passengers below, form part of, and must appear on, each contract ticket." There follow seven directions of which the last runs:—

"A contract ticket shall not contain on the face thereof any "condition, stipulation or exception not contained in this form."

These directions are followed by the substantive contract in the following bald form:—

"Ship..............of.............tons register, to take in pas-"sengers...........at...........for...........on the...........day "of...........for...........19......"

"I engage that the person named in the margin hereof "shall be provided with a steerage passage to, and shall be "landed at, the port of..............in the ship..............with "not less than 10 cubic feet for luggage, and shall be victualled "...........according to the subjoined scale...........for the "sum of £.............. and I hereby acknowledge to have "received the sum of £..............in full/part payment."

This in turn is followed by the statutory dietary scale and by a "Notices to steerage passengers," advising them to apply to the Government Emigration Office at the port in case of failure to obtain a passage, and to preserve carefully this part of the contract ticket till the end of the voyage.

[1] See *Statutory Rules and Order 1908*, pp. 613, 614.

On the back of the contract ticket as thus approved by the Board of Trade, the defendants had added, at their own hand, and without securing the approval of the Board of Trade, the exemption clause now founded on as absolving them from liability to the plaintiffs. The latter contended that assuming the exemption clause formed part of the contract ticket it was invalid under Direction 7.

The defendants founded on this very Direction as safe-guarding their right to add conditions on the back, provided they were not inconsistent with those appearing on the front.

Bailhache, J., though noting the defendants' arguments on the meaning and effect of Direction 7, did not deal with them in detail, but held the exemption clause invalid on the broad ground that the Board of Trade could not be held to have approved of what they had never seen. It followed that the defendants could not found on this clause, even if it formed part and parcel of the contract with the passenger.[1]

This was substantially the view of the majority of the Court of Appeal.[2] Entering more fully into the defendants' contentions, Vaughan Williams, L.J., held that neither the Statutory Directions nor the Notice to Passengers were part and parcel of the contract in the statutory form contained.

But he dealt with the case also on the basis that the exemption clause was part and parcel of the contract between the passenger and the ship, but that its operation was excluded by the terms of sect. 320 (2) which runs as follows :—

> "The contract ticket shall be in a form approved by the "Board of Trade and published in the *London Gazette*, and

[1] *Ryan* v. *Oceanic Steam Navigation Co. Ltd.* (29 T. L. R. 629).

[2] Vaughan Williams and Kennedy, L.JJ. (Buckley, L.J., dissenting), 30 T. L. R. 302.

"any direction contained in that form of contract ticket, not
"being inconsistent with this Act shall be obeyed as if set forth
"in this section."

His Lordship proceeded—

"The words 'In a form approved by the Board of Trade,' "may, in my opinion, be interpreted in the light of the pro- "visions that follow in the approved form. Now the approved "form contains, beyond a doubt, substantive provisions, and it "seems to me that these substantive provisions are of such a "character that if nothing be added to them certain implied "conditions follow as a matter of course; as, for instance, the "contract to use all reasonable skill and care in the carriage in "the ship of the passenger or his luggage. It is true that the "implied conditions may be excluded at Common law by "express words, but inasmuch as the exclusion would be to the "exclusion of a condition contained by implication in the form "of contract requiring the approval of the Board of Trade, the "exclusion could only be made by the addition of a clause "approved by the Board of Trade. Such an exclusion would, "though not inconsistent with the approved statutory form, be "inconsistent with the contracts to be implied by Common law "from the approved form as it stands. I do not go the length "of saying that the approved form of the contract cannot be "added to in respect of matters of substance, but I do say "that this can only be done with the express particular "approval of the Board of Trade. It is clear that in the "present case there has been no such particular approval."

Important as the Court of Appeal decision is, its limited scope must not be forgotten. On the legal question it is a decision on the interpretation of sect. 320 of the Merchant Shipping Act 1894, and the Regulations and Orders of the Board of Trade issued thereunder. Its sole effect is to hold invalid a negligence clause added by shipowners, without the previous approval of the Board of Trade, to the statutory contract ticket for steerage passengers in a ship for a voyage from the British Islands to a port out of Europe and not within the Mediterranean Sea. It is

confined, therefore, to a particular kind of ticket for passage on a ship engaged on a particular kind of voyage. It has no application to contracts for carriage on passenger vessels plying between the United Kingdom and European ports or engaged in the British coasting or cross-channel trades. In these and all other cases to which sect. 320 does not apply, a shipowner will be entitled as hitherto to include negligence clauses in his contract with passengers, subject always to his doing what is reasonably necessary to bring the existence of the conditions to the notice of the passengers. The reasonableness of the conditions is of no importance if the passenger was aware of them.

It is proper to point out, however, that the ratio of the decision may also apply to contract tickets for cabin passengers on any emigrant ship on a voyage as defined in sect. 320. An "emigrant ship" is defined in sect. 268 in terms which seem to make the character of the ship depend on the number of steerage passengers which she carries on a particular voyage, either absolutely or in proportion to her registered tonnage.[1] But it is only on emigrant ships that contract tickets in a form to be approved by the Board of Trade are prescribed for cabin passengers, and in the form of such tickets so approved there is no direction prohibiting

[1] (1) Merchant Shipping Act 1894, s. 268 "The expression 'emigrant "ship' shall mean every sea going ship, whether British or foreign, and whether "or not carrying mails, carrying upon any voyage [from the British Islands to any "port out of Europe and not within the Mediterranean Sea (sect. 364)] more than "50 steerage passengers, or a greater number of steerage passengers than in the "proportion . . . . (b) if a ship is a steamship, of one Statute adult to "every 20 tons of the ship's registered tonnage and includes a ship which having "proceeded from a port outside the British Islands takes on board at any port in "the British Islands such number of steerage passengers, whether British subjects "or aliens resident in the British Islands, as would, either with or without the "steerage passengers which she has already on board, constitute her a passenger "ship.

"(2) The expression 'Statute adult' shall mean a person of the age of twelve "years and upwards, and two persons between the age of one and twelve years "shall be treated as one Statute adult."

the addition of conditions, etc., not contained on the form. Where the use of the contract form is necessary, the ratio of Lord Justice Vaughan Williams' decision would seem to apply to invalidate any addition of which the Board of Trade had not signified its approval. But if the vessel for lack of the requisite number of steerage passengers on the voyage in question were not an emigrant ship, the exemption clause would apparently be valid as the ticket did not need to be in the statutory form.

If this view of the definition is sound, this odd result follows: it might be impossible to determine the validity of the clause until the vessel had sailed on her voyage, —when alone the actual number of steerage passengers carried could be known.

(2)

By the Maritime law as administered in England prior to 1813, the owner of a ship at fault for collision with another was responsible for all the damage occasioned. The first statutory limitation of a shipowner's liability for collision was introduced in 1813, by 53 Geo. III, c. 159, s. 5, which restricted the liability of the owner of "any duly registered ship" to the value of his ship and freight, and the limitation depending on proof of the actual value before the collision was a fruitful source of expensive litigation. By the Merchant Shipping Act of 1854, s. 504, a monetary maximum was for the first time introduced in regard to claims for loss of life and personal injury arising out of collision, the section providing that in regard to such claims the value of the ship and freight were never to be taken as less than £15 per registered ton. Like the preceding statute which it repealed, this section was expressed in general, though slightly different, terms, viz.:—"No owner of any sea-going ship . . . . . shall be answerable, etc., etc. . . . . ." Two further steps were

taken by Parliament in 1862. With the double object of preventing the owners of ships of small value having an advantage in collision over valuable vessels, and of obviating the need of proof of value, a rough average value was struck for all vessels at £8 or £15 per ton, according as the collision was accompanied by loss of life, or personal injury or not. The statutory limitation, moreover, was expressly extended to foreign as well as British ships. The British limitation, whether based under the old law on the actual value of the wrongdoing vessel or as at present on a monetary tonnage rate, has always been independent of the continued existence of the vessel at fault. Our law never permitted a shipowner to escape liability by surrendering the wrongdoing vessel to collision claimants.

Like the British Merchant Shipping Act of 1854, the American Statute of 1851 [1] purports to limit the liability of "an owner of any vessel," and the scope of the enactment has been left to the interpretation of the Courts. But in the two countries different results have been reached. In England the statutory limitation of liability was held to have no application to a collision between two foreign vessels outside the three-mile limit (*Cope* v. *Doherty* [1858], 5 K. & J. 367, affd. [1858], 2 De G. & J. 614), nor to a foreign ship in collision with a British beyond that limit (*The Wild Ranger*, 1 Lushington 553), even although the foreign ship's liability by the municipal law of her own State was the same as that of the British ship by British law (*The Wild Ranger*, *supra*; see Marsden, *Collisions at Sea*, 6th ed., pp. 207–8).

[1] Revised Statutes, U.S.A., 4282—4289. "The liability of an owner of "any vessel for . . . . any loss, damage or injury by collision, or for any "act, matter or thing, loss, damage or forfeiture done, occasioned or injured, "without the privity or knowledge of such owner or owners, shall in no case "exceed the amount or value of the interest of such owner in such vessel and "her freight then pending."

The Court refused to regard the statutory limitation as relating to remedy, and therefore binding on any litigant before an English Court, whether British subject or alien.[1]

In Britain, these discussions have now only an academic interest, for the Merchant Shipping Act 1894, s. 503, re-enacting s. 504 of the Act of 1854, expressly applies the limitation to any ship British or foreign.

In the United States, however, the statutory limitation is still contained in general terms not expressly applicable to foreigners. And the application of the owners of the *Titanic* was novel in this respect, that in no other case which had reached the Supreme Court, had the collision occurred between a foreign vessel and an object like an iceberg, which was not under human control. It is true that in *The Norge* (156 Fed. 855) the owners of a Danish steamer, which had been lost on the high seas through striking a derelict or other obstruction under water, filed a petition for limitation, but as they successfully contested all the claims filed against the ship, it was unnecessary to determine whether there were special exemptions from liability under the law of Denmark. The case, moreover, was not appealed from.

Before the Judge of First Instance, certain claimants against the *Titanic* disputed the right of her owners to the benefit of the American limitation on the ground, *inter alia*, that, as the collision had occurred to a foreign vessel on the high seas, the liability of her owners must be governed, in an American Court, by the law of her flag. After an elaborate review of the authorities, Judge Holt, on 21st April 1913, dismissed the petition, holding that the case of a collision between a foreign vessel with an iceberg on the high seas was analogous to that of collision between two

[1] "An attempt," said Turner, L.J., in *Cope* v. *Doherty*, at page 626, "was "made on the part of the appellants to bring this case within *Don* v. *Lippmann*, "and cases of that class, but I think those cases have no bearing upon the point. "This is a question of liability and not of procedure."

foreign vessels of the same nationality, and hence within the doctrine laid down by the Supreme Court in *The Scotland* ([1885], 105 U.S. 29), where Mr. Justice Bradley in the course of his opinion said:

"If a collision occurs on the high seas where the law of no "particular State has exclusive force, but all are equal, any "forum called upon to settle the rights of parties will *prima* "*facie* determine them by its own law, as presumptively ex-"pressing the rules of justice; but, if the contesting vessels "belonged to the same foreign nation, the Court would assume "that they were subject to the law of their nation carried under "their common flag, and would determine the controversy "accordingly. If they belonged to different nations, having "different laws, since it would be unjust to apply the law of "either to the exclusion of the other, the law of the forum, that "is, the Maritime law as received and practised therein, would "properly furnish the rule of decision" (pp. 29, 30).

Apart from authority, he rejected the application on three fundamental principles: (1) the rule that the law of no nation has any extra-territorial effect is universal: (2) the rule that a ship on the high seas is a part of the country to which she belongs is universal: (3) the rule that liability for a tort is governed by the *lex loci delicti*. He appeared therefore to agree with the view of Turner, L.J., in *Cope* v. *Doherty*, that statutory limitation of a shipowner's liability was a question of liability and not of procedure.

The Oceanic Steamship Company Limited appealed to the United States Circuit Court of Appeal, which certified certain questions to the Supreme Court as follows[1]:—

"(A) Whether, in the case of disaster upon the high seas, "where (1) only a single vessel of British nationality is con-"cerned, and there are claimants of many different nationalities, "and where (2) there is nothing before the Court to show

[1] The official report of the Supreme Court decision not being available at the time of going to press, the following questions are taken from an explanatory statement issued by Mr. Charles C. Burlingham, counsel for the White Star Line, and published in *The Shipping Gazette*, 3rd June 1914.

"what, if any, is the law of the foreign country to which the "vessel belongs, touching the owner's liability for such disaster, "such owner can maintain in a District Court of the United "States a proceeding under sects. 4283, 4284, and 4285 of "the United States Revised Statutes and the 54th and 56th "rules in Admiralty?

"(B) Whether, if in such a case it appears that the law of "the foreign country to which the vessel belongs makes pro-"vision for the limitation of the vessel owner's liability, upon "terms and conditions different from those prescribed in the "Statutes of this country, the owner of such foreign vessel can "maintain a proceeding in the Courts of the United States "under said Statutes and rules?

"In the event of the answer to Question B being in the "affirmative:

"(C) Will the Courts of the United States in such proceed-"ing enforce the law of the United States or of the foreign "country in respect of the amount of such owner's liability?"

The Court answered the first and second questions in the affirmative, and the third "the law of the United States."

The result of the decision is, that the American Courts, in the proceedings to limit owners' liability, will enforce the United States and not the British Statute. Nothing more has been determined, however, than the system of law applicable to the proceedings. It remains to be decided (1) whether the accident was due to negligence, and (2) if there was negligence, whether the company itself was at fault as well as the ship's officers.

In the opinion of the Supreme Court, delivered by Mr. Justice Holmes, Mr. Justice McKenna alone dissenting, the principles founded on by Judge Holt, were considered and discarded, as affording no guidance in the interpretation of the Statute.

Mr. Justice Holmes said:

"It is true that the Act of Congress does not control, or "profess to control, the conduct of a British ship on the high "seas. It is true that the foundation for a recovery upon a

"British tort is an obligation created by British law. But "it also is true that the laws of the forum may decline "altogether to enforce that obligation, on the ground that "it is contrary to the domestic policy, or may decline to "enforce it except within such limits as it may impose. It "is competent, therefore, to Congress to enact that in certain "matters belonging to Admiralty jurisdiction, parties resorting "to our Courts shall recover only to such extent or in such "way as it may mark out. The question is not whether the "owner of the *Titanic*, by this proceeding, can require all "claimants to come in and can cut down rights vested under "English law, as against, for instance, Englishmen living in "England who do not appear. It is only whether those who "do see fit to sue in this country are limited in their recovery "irrespective of the English law. That they are so limited "results, in our opinion, from the decisions of this Court.

"It is not necessary to consider whether the Act of "Congress may not limit the rights of shippers or American "vessels to recover for injuries in our waters or on the "high seas, so that if they sued in a foreign Court they "could not be allowed to recover more than the Act allows "if our construction of the law were followed. A law that "limits a right in one case may limit a remedy in another. "This Statute might well be held to announce a general "policy, governing both obligations that arise within the "jurisdiction and suits that are brought in the Courts of the "United States. It clearly limits the remedy, as we have "shown, in cases where it has nothing to say about the rights.

"We see no absurdity in supposing that if the owner of the "*Titanic* were sued in different countries, each having a differ- "ent rule affecting the remedy there, the local rule would be "applied in each case. It can be imagined that, in conse- "quence of such diverse proceedings, the owner might not "be able to comply with the local requirements for limitation, "as it also is conceivable that, if it sought the advantage of an "alien law it might as a condition have to pay more than "its liability under the law of its flag in some cases. But "the imagining of such possible difficulties is no sufficient "reason for not applying the Statute as it has been construed, "on the whole, it would seem, with good effect."

The opinion of the Supreme Court, as delivered by Mr. Justice Holmes, is thus expressly based upon the view that the American limitation deals with remedy and not with liability. The result is, that the American Courts, by interpretation of a Statute expressed in general terms, have reached the same position as the British Parliament by express enactment. In each country the owner of a foreign vessel, when sued for claims arising out of a collision on the high seas, is admitted to the benefit of the limitation Statute provided by the local law, and this irrespective of the nationality of the vessel, or of the claimants, or of the limitation under the law of the flag.

A. H. CHARTERIS.

V.—THE REFORM OF LOCAL TAXATION.[1]

THE conclusions and recommendations of the Departmental Committee on Local Taxation form the subject of the last chapter of their Final Report which has recently been issued. This chapter deals with the amount and form of State subventions, and the recommendations relate to Exchequer contributions in respect of Education, Poor Relief, Police, Public Health, Criminal prosecutions, Registration of Births and Deaths, and the general arrangements affecting the grants for these purposes, the Rating of Land Values and other possible sources of Local Revenue, the Machinery of Rating, and the Inequalities of Rates between Local Government areas. These recommendations —with the exception of that in regard to the rating of Land values—are subscribed by all the members of the Committee.

[1] *Final Report of the Departmental Committee on Local Taxation, England and Wales.* London: Wyman & Sons. 1914.

On that particular subject six of the members of the Committee submit a separate Report of considerable length and importance. These members concur with their colleagues in "rejecting as impracticable and impolitic any proposal to raise the whole amount of local rates by a rate on land values." Just as the recommendations as a whole derive their chief importance from the fact that they are likely to form the basis of a Bill for the reform of the present rating system, so the rejection referred to is significant as an indication of the great improbability that the rating of land values as such will form any part of this reform so long promised, and which may be regarded as the evolution of public opinion on a system of local taxation which has survived the changes of three centuries, and which by the marked development of industrial conditions of the last half-century has been rendered wholly inadequate.

The Committee recommends the total abolition of the Assigned Revenue system, which Viscount Goschen (then Mr. Goschen) introduced in the year 1888. By the Local Government Act of that year, except in the case of Elementary Education, the system of Assigned Revenues was substituted for that of direct grant, which was in force up to that year. This system, under which the produce of certain taxes was paid into the Local Taxation Account, and doled out therefrom in aid of certain services by county, and county borough councils, was dealt with by the Royal Commission on Local Taxation in 1901. It involves the whole question of the relationship of Local and Imperial Taxation, and certain it is that, since particular tax revenues have increased, and the increased yield retained by the Government for purposes other than those to which these taxes were in 1888 assigned, the whole system has got into much disfavour.

The administration of Local Government, too, has been so extended and even changed in character that this system

of distribution has been looked upon for many years as a most defective one, and as resulting in an inadequate State aid to local services. Of course, as already pointed out, the question involves a careful study of national and local service, and their exact relationship one to the other is by no means a solved problem. The Royal Commission, in their Report, referred to services which were "national and onerous," and those which they considered "local and beneficial," but the Departmental Committee, after a further examination of this classification, concludes that such terms are inappropriate, and in substitution therefor suggest the triple division of "national, semi-national, and local." Seldom ever has classification become so important, for on this division seem to rest many of the Committee's recommendations, particularly that already referred to, namely, the total abolition of the Assigned Revenue system.

Still, mere classification of services can never of itself be sufficient reason for the abolition of any system of grants for those services. It will be remembered that the Royal Commission in 1901 recommended the retention of the Assigned Revenue system, though the Minority Report recommended the substitution of "Block grants." As already pointed out, in the matter of elementary education, the old system of Direct grants had been left unaltered, so that these existed side by side with the Assigned Revenue system. Now, education is one of the branches of local administration in which there has been very great change since the year 1901, and to this, together with the Old Age Pension Act, and the National Insurance Act, 1911, may be attributed the desire to get rid of the Assigned Revenue system, and either revert to the old system of Direct grants from the Consolidated Fund, or some other form of State subvention. Although the Departmental Committee declare the "Block grants" to be more appropriate in the present condition of Local Government administration, they appear to have

combined some of the features of this system with that of the "Allocated grants" system, and their recommendations are certainly not marked with very great clearness, and will, when embodied in a Bill, be subjected to very severe criticism. One thing, however, is fairly clear, and it is that the Committee's proposals certainly aim at the simplification of the grants. At present there are no fewer than eight kinds of grants towards education, which, after all, is perhaps the most distinctly national service administered locally of all.

It is, of course, impossible in the space of this short article to discuss the details of the proposed alterations, but it certainly is satisfactory to note the Committe's recommendation "that all grants be conditional on the efficient "administration of the services in respect of which they are "given, and be made subject to a general power of reduction "and regulation on the part of the Supervising Government "Department" (par. 390). Before leaving the question of grants, I should point out one other important feature of the proposals. It is proposed "that the entire cost of "Criminal prosecutions and the whole of the additional "expenditure caused by the Criminal Appeal Act be borne "by the Exchequer, and that a grant be made of one-half "the net charge that would otherwise fall upon the rates in "respect of Criminal prosecutions" (par. 385, i and ii).

The total increase of the proposed Government subventions is estimated at £4,700,000.

I have already pointed out the views expressed by the Committee on the question of rating Land Values. It is further interesting to find that the Committee does not favour the substitution of a local income tax, either wholly or partly, for the present system; in fact, they submit that the administrative difficulties in the way of such a substitution are practically inseparable. Neither can they recommend the transfer of the Inhabited House Duty to the local authorities.

In dealing with this Chapter of the Committee's Report, it probably will not be denied that, next to the question of grants, the proposals for the reform of the machinery of rating are highly significant, especially as it is probable that a Bill for the reform of the whole Rating System, based on these proposals, will shortly be introduced.

Of these, the most important is that which has already been attacked with much vigour on all hands, namely, that the preparation of all valuations for rating purposes be transferred from the overseers of the poor to the Land Valuation Office. That this proposal was expected by those in authority can scarcely be denied. In November 1912, after the appointment of the Departmental Committee, a letter of great significance passed between Mr. Lloyd George and Sir John Kempe, the Chairman of the Committee, in which the Chancellor of the Exchequer says, "a great "Government Department has been created for the purpose "of the Finance Act, 1910, and it would be important to "learn whether, in the opinion of the Committee, it would "be desirable that this Department should be utilised for "the creation of a uniform and simple valuation for the "purpose of rating."

It is not surprising, therefore, that the Departmental Committee recommend this drastic and exceedingly far-reaching change. And, it appears that they anticipate opposition, for they say, "the intervention of the Government "ment Valuation Staff in local valuation, may meet with "some opposition" (par 321). At present it seems fairly certain that this anticipated opposition is likely to be keen and wide-spread, for the proposal is looked upon as an intrusion of local administration by a Government Department, which may possibly be the forerunner of many so-called reforms, by which local control will be superseded by Departmental Government in matters essentially belonging to the sphere of Local Government.

The Committee proposes to leave the hearing of what they term appeals, but which in strict terms are objections, to the local assessment committee. This body, however, will probably undergo a change in constitution, for it is recommended that it should "comprise representatives of "the counties, boroughs, and districts concerned," which presumably means that its members shall be elected by, and from the governing bodies of those areas. There will, no doubt, be some improvement in the arrangements for the submission and hearing of objections, but it is doubtful whether the proposal with regard to appeals will prove a satisfactory one. It is certainly drastic, though one which has for many years been expected. The present functions of Quarter and Special Sessions, in relation to appeals, are to be entirely abolished, and from the decision of the Assessment Committee an appeal will, if the proposals become law, not be to those Sessions but to a Special Appellate Tribunal consisting of a practising barrister or solicitor and two eminent valuers, the decision of this tribunal to be final except on points of law. The right of appeal is to be enjoyed by the Land Valuation Office, the overseers, parish council, or an aggrieved ratepayer.

This recommendation is found in paragraph 323 (J), and is certainly not a specimen of clear and skilful draughtsmanship. Indeed, it appears to be mostly loosely based on sect. 32 of the Valuation (Metropolis) Act 1869, and as it stands is almost unintelligible. If the provisions of paragraph 322 ever become law, it is almost impossible to conceive of circumstances in which the overseers, at any rate, can become parties to an objection before the Assessment Committee, so as to entitle them to the exercise of a right of appeal to the Appellate Tribunal.

The assessments of special properties, such as docks, railways and canals, are not to be the subject of objection

to the Assessment Committee, but an appeal direct to the Appellate Tribunal appears to be the course suggested.

That the present rating system requires considerable amendment, if not drastic reform, seems to be admitted on all hands, but whether the foregoing proposals, if embodied in a Bill, are such as to meet with general approval, is extremely doubtful, and remains to be seen.

REFORMER.

VI.—CURRENT NOTES ON INTERNATIONAL LAW.

The Russo-Turkish Arbitration.

THE proceedings in the arbitration which took place on the question of the liability of Turkey to pay to Russia interest on the unpaid balances of the war indemnity of 1879 merit a word or two of notice, based on an article contributed to the *Jahrbuch des Völkerrecht* by Baron S. A. Korff. The proceedings, though conducted at the Hague in October—November 1912, were not, strictly speaking, before the Hague Tribunal. That tribunal admits only one arbitrator of each nationality: in this case there were two of each—Baron Taube (Russian) being the best known name. Dr. Lardy (Swiss) was chosen as umpire, and he was thus the only neutral concerned. The proviso that no dissent was to be recorded cannot be commended. It is advocated as investing the decision with greater force. But, as Westlake has shown, the apparent homogeneous force of the decision is purely factitious. Only a child would ascribe any greater value to the decision of five personages because the mouths of two of them are closed! Such a practice has actually the effect of weakening the force of all decisions of a tribunal that adopts it. For it is always possible that a given decision may be that

of a mere majority. The practice is, it may well be believed, one of the reasons of the inferiority of the Privy Council to the House of Lords as a source of law. It is not calculated to enhance the authority of the English Criminal Appeal Court: and it formed one of the strongest objections to the International Prize Court proposed at the second Hague Peace Congress. A sentimental value may be attached to the single judgments being "the judgment of the Court." But the judgment is the judgment of the Court in any event. And the opinion of three men is not converted into the opinion of five men simply by styling it such.

The Tribunal decided (1) that interest was payable on demands of nation against nation, at any rate on liquidated cash demands; (2) that the Russian war indemnity, though expressly executed for the compensation of Russian individuals, was in principle a national claim; (3) that the financial and political difficulties of the Ottoman Government were not such as to constitute *vis major*, impeding it from the fulfilment of its undertaking, but (4) that Russia, after eleven years, could not fairly spring this claim upon the Turks.

The decision seems right and equitable, though the international lawyer will feel inclined to put it on much broader and more elastic grounds than on this somewhat artificial chain of reasoning. The actual attitude of the Tribunal, and indeed the whole atmosphere of the proceedings, was permeated by an air which it may be permissible to criticise. It was the close assimilation of the process to the trial of a private law case—and a French private law case. The advocates were French and the language was French—and perhaps it was inevitable that the legal *milieu* should have been French as well. None the less, it is to be

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regretted that Russians should be able to complain that an important question of International law had been decided "on the French Civil Code." It was not perhaps a justified complaint: but there was an element of justification for it. An International Tribunal should have disembarrassed itself of the preconceptions of municipal law, instead of referring to them at every turn. An international liability should have been established, not on the narrow analogies of familiar municipal systems, but on the broad common agreement of civilized mankind. If this Gallicizing or Anglicizing tendency of International Tribunals should be persisted in, it will contribute a serious danger to the already dubious future of International Arbitration.

Hayti.

Fulfilling the implied promise embodied in the Note on Honduras which appeared three months ago in this magazine, the writer now enters a protest against the British extortion of £12,000 in cash from Hayti. It matters not that Hayti is black and eccentric. As long as it is an independent State, it is entitled to maintain its government against rebels by force of arms, without being responsible for injury which the subjects of foreign States may unavoidably receive in the process. Really, Hayti belongs to the Haytians, and not to British merchants. And if British merchants go there they ought to be prepared to take the consequences, as Bismarck always maintained in regard to Germans. Foreigners must take the risks of settling in an unsettled country. As Belgium, America, Mexico, Russia, Greece, France, Spain, Peru, Brazil, Chili, and even Tuscany, have on various occasions successfully maintained, a government is not bound to treat foreigners better than its own people, and to compensate them for the injury they may sustain in the course of civil war. Were it

otherwise, as Nesselrode observed long ago, the presence of foreigners within the limits of a State would be a source of perpetual danger. Any rebel could put irresistible pressure on the government simply by threatening the foreigners' property. It is impossible to admit such a right of compensation; and it is believed only to have been paid as a matter of grace in the past, with two or three abusive exceptions such as this raid on the Haytian treasury and the attacks made some years ago on Venezuela.

The semi-official announcement of the incident was one of the strangest we have seen. It was anxiously and emphatically explained that "no ultimatum had been presented." All that had transpired was that the British diplomatic representative has said that if he was not paid he would leave the country. What, it may be wonderingly asked, is an ultimatum if this is something else?

Mexico.

The commendation which British observers have so long been proud to extend to President Wilson has had to be regretfully suspended. The Presidential message in support of the slaughter of Mexicans defending their country is poor reading. An attempt is made to make out a case of systematic unfriendliness to the United States—supported by one instance of arrest of a seaman and one instance of a delayed mail. Why, in any case, should the United States expect equal treatment from a government with which they have refused to have any relations? The real reason for war can only be guessed at; but a dangerous symptom is the readiness of the English press to assume that war is justified by the unfortunate dissensions of Mexico. The assumption that a civilized State cannot tolerate prolonged disturbance in a neighbouring territory is apparently swallowed without examination. It

is nevertheless pure cant: and only means that such a nation cannot patiently endure the loss of a handy market. We have here only one more variation of the argument of the Wolf against the Lamb. "You are fouling my water!"—"Surely not; I am lower down the stream."—"No matter, I don't like to see it—and I am going to eat you!" There is not the least evidence that a coterminous State might not continue to fight for an indefinite time without causing its neighbour more than some considerable inconvenience. The fashionable newspaper argument would much more properly justify the suppression of ordinary wars between separate States. That it should be accepted so widely as an incontrovertible article of faith is of no good augury for the future.

Force without War.

An even graver mistake, if possible, was perpetrated by the President when he assumed that it was possible to use force in a foreign territory without necessarily inaugurating war. This removes a check on war, and opens a door for a *régime* of naked violence, playing upon the fears of a weak antagonist as far as it is able. So long as all armed attack on a foreign country means war, there is a certain safeguard against violence. If once it is recognised that a strong country may use force in a weak one without committing itself to war, all safety disappears. Wars may be less frequent—but unregulated violence will be a great deal more frequent, than before. Every student of International law must deprecate such a prospect, which is inconsistent with the very idea of national independence. Obviously, the President's desire was to use force without complying with the constitutional checks and international complications that surround a declaration of war. In a less admired statesman, this might be styled sharp practice.

Mr. Root distinguished, in the course of an able speech in the Senate, between "intervention" and "war." Intervention *is* war. Only it is war with a political object. It is simply the most unjustifiable form of war — war undertaken, not to enforce one's rights, but to subserve one's interests. Mr. Wilson's protestations that the United States desires no Mexican territory deceive no-one. He very likely does desire no Mexican territory —but he does desire to have his own way in Mexico. As has been noted, it is very easy to disclaim, like Lord Salisbury, all desire for the Naboth's vineyard which one wishes to control. "We seek no goldfields" — all we want is to have our own way where the goldfields are. It is much less troublesome and quite as remunerative.

But if there is no war in existence, by what right does the United States' navy intercept the access of European vessels to Mexican ports? We hesitate to believe that intelligence of such acts is boycotted in the English press, or that comment upon them is deliberately suppressed. It certainly seems strange, nevertheless, that more is not heard of these incidents. It is impossible to capture vessels of neutral nations for breach of blockade or carriage of contraband if there is no war. No prize court to try such vessels could be established. The strange course seems to have been pursued of warning them off, under vague threats of undefined penalties. Communication with Vera Cruz is certainly not interrupted, and the question is, on what terms does it take place? The German s.s. *Ypiranga* was said, at the outset of the United States proceedings, to have been intercepted —and it has been stated that Germany has protested against this interference. It would be satisfactory to know the facts.

Mexican Loans.

A loan having been issued by the Mexican Government, the United States President is understood to have intimated that it would not be regarded by the United States as binding the Mexican revenues. This evinces a strange misunderstanding of International law. It has always recognised the power of a *de facto* government. Interference with the internal affairs of nations has always been repugnant to it. Monarchical States, by virtue of this principle, have acquiesced in republican usurpations in neighbouring territories, and constitutional States have acquiesced in the subversion of constitutions. The confiscation of quasi-private estates of rulers even, has been considered a *fait accompli* which cannot be questioned. In the case of the Elector of Hesse-Cassel, whose territory was overrun by the French, it was held that the dispositions of his property made by authority of the intending Westphalian kingdom, were perfectly valid. Murat's intromissions in the two Sicilies were similarly respected. International law is a thoroughly practical science, which looks to actualities. The legitimacy of governments is a matter of unconcern to it, so long as they are there.

It can scarcely be denied that President Huerta was "there"; the movement against him did not affect the fact that for an appreciable time he was the sole depository of power in Mexico. That he could, therefore, have disposed of the Mexican revenues is a plain corollary.

The argument is brought forward, however, that, by the terms of a previous loan, emitted by an equally valid *de facto* government, the Mexican government is incapable of borrowing in the method proposed. The reply to this is that the previous loan referred to was concluded without due constitutional authority, and is not, therefore, binding.

This argument is not inconsistent with the general position that an established government is entitled, whatever its constitutional flaws or limitations, to represent the State. For this is a proposition of International law; whilst the proposition that the powers of governments to borrow money must be limited by their constitutional powers is a question of mere private law. As between two States, the doctrine remains true, that neither is obliged to inquire into the constitutional position of the other. It is recognised that the intercourse of States is not to be complicated by the necessity for such difficult and delicate inquiries; but it does not follow that a private person who proposes to deal with a government is exempt from the like inquiries. He is entitled to assume the legitimacy of the government, but he is not entitled, as his government may be, to assume its autocracy. Consequently, the possible want of power of the former Mexican administration to bind the State to the terms of a loan without the consent of the Senate, may effectually prevent the lenders from relying on such an agreement, whilst at the same time their governments may be equally debarred from impugning the title of the present administration to administer the Mexican revenue.

September Congresses.

A series of important meetings will take place in September which is worthy the attention of those who believe in the value of such means of cultivating International friendship. The first is the twenty-ninth Conference of the International Law Association, to be held at the Hague, September 7—12. The programme, as usual, caters for all tastes, from the philanthropist to the shipowner. Two new subjects, "River Frontiers" and "The Hague Opium Convention," appear on the list. The former will be introduced by Mr. Joseph Illés, M.P., Pesth, and the latter by one of the chief

authorities on the topic, a former honorary secretary of the Association, Mr. J. G. Alexander. "Problems arising out of the wreck of the *Titanic*" will form the subject of a paper by Mr. Whitelock, Secretary of the American Bar Association, and another new subject will be "Armed Merchantmen," by Dr. A. Pearce Higgins. Many topics already discussed will, it is hoped, be advanced a stage. Prof. Norman Bentwich will deal with the question of the adhesion of Asiatic States to the Hague Private Law Conventions. The hosts of the Conference are co-operating actively in the debates, such acknowledged authorities as Prof. Jitta (who will preside), Prof. van Eysinga, Prof. Kosters, Mr. Lind, and Mr. de Jong van Beek en Donk, contributing papers, whilst an attractive programme of hospitalities has been drawn up.

A week-end journey up the Rhine and down the Danube will bring the visitor to Vienna, where during the ensuing week the Universal Peace Congress is to take place. The regretted death of the well-known pacificist, Baroness B. von Suttner, of that city, necessarily casts a shadow over the Congress, which should nevertheless prove a great success, inasmuch as it is being diligently and skilfully organised. Later in the month the Institute of International Law holds its annual session at Munich.

TH. B.

VII.—NOTES ON RECENT CASES (ENGLISH).

THE decision of Mr. Justice Astbury in *Hewson* v. *Shelley* (L. R. [1913], 2 Ch. 384), to which we took strong exception (see *Law Magazine*, Vol. XXXIX, p. 225), has now been unanimously reversed by the Court of Appeal (see L. R. [1914], 2 Ch. 13). No doubt there were several very early and most inconsistent decisions, and one very late one (*Ellis* v. *Ellis*, L. R. [1905], 1 Ch. 613), which more or less forced

Astbury, J., to come to the decision he arrived at, but which were not binding on the Court of Appeal. That Court gave many excellent and learned reasons for disregarding these decisions, but the real one was that stated by us. It would be nothing short of a scandal of the first magnitude if the Court, having publicly authorised a person to sell property as administrator of a deceased intestate, should be able after the sale to repudiate its authorisation and inform the unfortunate purchaser, who had given away his money on the strength of this authorisation, that he had got nothing in return, and had in effect been defrauded with the sanction of the Court. It is only common sense and common honesty for a Court to hold that all acts done with its sanction are binding and effectual in law, save as regards parties who have betrayed the Court's confidence.

As the Master of the Rolls said, the case of *In re Gardom, Le Page*, v. *Attorney-General* (L. R. [1914], 1 Ch. 662), raised some curious points of law (see p. 674). It is a pity they were not decided. For instance, Eve, J., held that a private trust, the terms of which are not set out in a will, may be proved by oral evidence, although it appears on the face of the will that the executors are to hold the property bequeathed on a trust not disclosed in the will. In the second place, he held that a trust is charitable even though it is for the benefit of ladies not poverty stricken but merely "of limited means." With all respect to the learned judge, we cannot help agreeing with the Master of the Rolls that these are curious points of law, in fact, very curious—if they are law at all.

There is a rule of construction that when personalty is bequeathed to the testator's next-of-kin after the death of a person, then the person on whose death the personalty is to go to the next-of-kin takes by implication a life

estate in the personalty. (*In re Springfield, Chamberlain* v. *Springfield* (L. R. [1894], 3 Ch. 603).) Is there any reason why this principle should not be applied to a gift of personalty to the next-of-kin on the failure of *all* of a class. The principle is the same in each case. The fact that the testator does not contemplate the next of kin (who would take on an intestacy) taking, until all of a certain class, among whom he has given his personalty in shares, fail, shows that he implicitly intended to make a gift of it to this class until and unless such event occurred. Eve, J., has, however, held that where personalty is left to a class for life, and on the death of each member to his issue with a gift over to the next-of-kin on the death of *all* the class without issue, the share of one of the class who dies without issue is undisposed of and goes to the next-of-kin. (*In re Mears, Parker* v. *Mears* (L. R. [1914], 1 Ch. 694)).

As Lord Macnaghten pointed out in *Colls* v. *Home & Colonial Stores* (L. R. [1904], A. C. 179), the Act, commonly called Lord Cairns' Act, which allows the Court to give damages in lieu of an injunction, was intended to be used, though in fact the Court has shewn great reluctance about using it. The Court has also frequently displayed an inability to distinguish between giving damages as a Court of Equity in lieu of an injunction, and giving damages under the Judicature Act as a Court of Law, where no case for an injunction is made out. Yet the principle which should regulate the assessment of damages in each case is very different—the one including merely damages up to date of issue of the writ in the action, the other including also all damages which the issue of an injunction would prevent. As examples of this confusion we may refer to *Tunnicliffe & Hampson* v. *West Leigh Colliery Co.* (L. R. [1908], A. C. 27) and

Griffith v. *Richard Clay & Sons Ltd.* (L. R. [1912], 2 Ch. 291). This tendency will not be checked by the head-note in *Pettey* v. *Parsons* (L. R. [1914], 1 Ch. 704), where, though the damages were expressly stated by the judge to be given under Lord Cairns' Act, the reporter carefully avoids referring to that Act at all in the head-note.

Two rather important cases in the administration of assets are *In re Oxley, John Hornby & Sons* v. *Oxley* (L. R. [1914], 1 Ch. 604), and *In re Jones, Peak* v. *Jones* (L. R. [1914], 1 Ch. 742). In the former case it was held that the mere fact that creditors of a deceased person "held their hands" while the executor continued to carry on the deceased's business, was not sufficient in itself to show that the business was being carried on with their approval so as to postpone their claims to debts incurred by the executors in carrying on the business. In the second case it was held that an executor who, before assets of an insolvent testator came in to pay a debt, himself out of his own money paid it, was entitled as against the testator's other creditors to appropriate assets subsequently coming to his hands to meet the expenditure. Whether this extension of an executor's right to prefer is altogether desirable is open to question.

The Statute of Frauds is said to have been the subject of more legal literature in the form of commentaries and reported decisions than the whole Code Napoleon. It still gives opportunities for nice points. One of these was decided in *Daniels* v. *Trefusis* (L. R. [1914], 1 Ch. 788). There the question was: What amounts to a sufficient note or memorandum of a verbal contract for the sale of land to satisfy the statute? The decision was, that a note of the terms of the verbal contract supplied by the solicitors of the party and with his authority for purposes quite alien to authenticating the contract, was sufficient. This seems to

us quite correct. All the statute requires is written evidence of the contract. Why that evidence came into being is a question of no importance.

In *Wood* v. *Conway Corporation* (L. R. [1914], 2 Ch. 47), the question arose whether an injunction should issue where fumes from gasworks did not interfere with the comfort of the neighbouring landowner, but did interfere with the health of his trees. The Court of Appeal (affirming Joyce, J.) held that it should issue, because the interference, though not perhaps a nuisance, was a permanent and continuous injury to the neighbour's property, the extent of which could not be sufficiently accurately ascertained to be compensated for by damages under Lord Cairns' Act. The difficulty here was, of course, to ascertain, not the extent of the inquiry up to date, but the possible extent of it in the future.

The case of *In re Drummond, Ashworth* v. *Drummond* (L. R. [1914], 2 Ch. 90) may be usefully compared with another of Eve, J.'s decisions cited above (*In re Gardom*). In this case he held that a trust for the workpeople in the spinning department of a factory was not a charitable gift, as such workpeople were not poor within the statute of Elizabeth. Gentlefolks of "limited means" are.

J. A. S.

Out of the abundance of workmen's compensation cases which the High Court has been called upon to consider, few incidents have led to more contradictory decisions than the one where an accident has happened to a sailor not actually on shipboard. *Parker* v. *Owners of Ship Black Rock* (L. R. [1914], 2 K. B. 39), adds one more to the number. The question was, whether a claim under the Act could be supported by the representatives of a sailor

who was drowned in his endeavour to reach his ship. By the articles of agreement the crew were to provide their own food, and it was to procure stores for himself that he had gone ashore. The Master of the Rolls and Eve, J., were of opinion that the sailor was only acting in his own interests, and was in the same position as a factory hand would be in going for his meals from his workshop to his home; and the stipulation about obtaining his own food was not a contractual obligation towards the owners. On the other hand, the President held that, even if the stipulation did not form an express contract, a contract would be implied, for it was part of the business of the ship that the sailor should procure food to enable him to do his work. But as the President was in a minority, the decision was against the plaintiff. One of the leading cases, that of *Moore* v. *Manchester Liners, Limited*, was noted in our issues of May 1909 and February 1911, Nos. 352 (Vol. XXXIV) and 359 (Vol. XXXVI) respectively.

In *Oelkers* v. *Ellis* (L. R. [1914], 2 K. B. 139), Horridge, J., has steered through some conflicting decisions, and decided, in accordance with the weight of authority, that, though the Statute of Limitations is a bar to a claim for breach of duty, it is not a bar to one based on fraud so long as the plaintiff remains, without any fault of his own, in ignorance of the fraud; and this notwithstanding that the wrong doer has taken no active measures to prevent detection. It is a logical assumption, supported by some of the decisions, that the Statute would not begin to run till the time when the discovery of the fraud was made. Probably, however, when the discovery is not made till after six years from the date of the transaction, any considerable delay in taking proceedings would, in the absence of good reason for delay, be hazardous.

In re Phillips (L. R. [1914], 2 K. B. 689), was merely an application for directions, and, as there was no legal or equitable claim, the judgment could not be a very strong one. But it will be of authority if hereafter a similar case should arise of a bankrupt taking out, unknown to the official receiver, a policy on his own life before the expiry of a term for which his discharge was suspended, and then, after paying many premiums, becoming bankrupt a second time. On his decease, the trustee of the first bankruptcy had an admitted right to the proceeds of the policy. But the official receiver of the second submitted that the amount of the premiums paid should be allowed to him, for by so much the assets available for distribution in the second bankruptcy had, of course, been diminished. But it was held, and rightly, that there was no moral obligation on the official receiver of the first bankruptcy to surrender them.

In our issue for May last (No. 372, Vol. XXXIX), a note on *Grimble & Co.* v. *Preston* commented on the importance at a trial of taking prompt objection when there has been an omission of any essential formality in preliminary proceedings. In *Rex* v. *Thompson* (L. R. [1914], 2 K. B. 99), the desirability of promptitude was again pointed out. The Court was of opinion that a defect on the face of an indictment should, in strictness, be taken before plea. But the danger of acting contrary to this opinion was removed to the point of harmlessness by the relieving announcement that "we do not decide that the objection may not be taken at a later period, or even after verdict." The suggestion seems to leave the enforcement of the technicality unsupported by any legal principle.

The Finance Act 1910, sect. 46, relates to "tied houses" only, and imposes upon the person from whom a licence

holder is bound to obtain a supply of intoxicating liquors, such part of the burden of increased licence-duty as may be proportionate to any increased rent of the licensed premises or increased prices of the liquors supplied. The latter clause, as to increased prices, was probably inserted because sometimes higher charges are made to the holders of tied houses than to the licensees of free houses. These "free" houses are dealt with by the Finance Act 1912; sect. 2 of which entitles the lessee to recover from the lessor so much of the increase of licence duty as may be proportionate to any increased rent or premium on account of the premises being let as licensed premises. In *Procter* v. *Terry* (L. R. [1914], 2 K. B. 178) it was held that, in ascertaining the proportionate part, the point to be considered was the difference between the existing rent as licensed premises and the rent which would be obtained for the same premises merely adapted to other business purposes or to domestic use; not what additional rent might be obtained if the site were fitted to more profitable uses by a considerable capital outlay.

A sentence of hard labour for an attempt to commit suicide, was, on the ground that the crime was an attempt to commit a felony, supported in *Rex* v. *Mann* (L. R. [1914], 2 K. B. 107), against the appeal which raised the contention that the attempt could not be a felony, as the Act 33 & 34 Vict., c. 23, speaks of treason, felony or *felo de se*, and thus separates *felo de se* from felony. Blackstone, in Book IV, chapter 14, says, "the law has ranked this among the highest crimes, making it a peculiar species of felony."

Of the two judgments in *Norman* v. *Great Western Railway* (L. R. [1914], 2 K. B. 153), it may be permitted to give a preference to that of Bray, J., over that of Lush, J. That a

railway company, owing to its public calling and its statutory privileges, is under a higher obligation than a private trader to keep its premises reasonably safe for persons using them, is a firmly established principle. Both judges, of course, concurred in that. The interesting point is their divergence of opinion on the question of negligence. If a station yard, to which carriers are bound to resort in the course of business, has in it a declivity, there is in that fact a permanent source of danger. If the slope is within a few yards of a weighing office to which carriers must go for the railway company's requirements, the possibility of danger is increased. And if the slope is left unfenced the possibility expands into probability. The probability is not much diminished, though no accident has happened at the spot. This is shown by the present case, where the plaintiff's horse backed the cart over the slope while the driver was in the company's weighing office on business. Lush, J., found contributory negligence, because the accident would not have occurred if the horse had not been left unattended. But, similarly, the accident would not have occurred if the dangerous slope had been fenced. And to so guard such a pitfall was a primary obligation on the company as well as a prudent precaution in their own interests. On all grounds the judgment of Bray, J., seems the better.

Lucy v. *Bawdon* (L. R. [1914], 2 K. B. 318), is another case of alleged negligence, but in this instance imputed to a private person. The plaintiff, wife of a tenant of rooms in a lodging-house, had here however no remedy for injuries received from slipping from defective doorsteps and falling thence into an insufficiently protected area. Both steps and area were under the control of the landlord. But Atkin, J., in a considered judgment, based his decision against the plaintiff on the ground that she had knowledge of the disrepair of the steps, and that, in the absence of agreement,

there is no obligation on a landlord to do more than avoid traps, as he is not liable for the consequences of letting a house in disrepair, even if the disrepair is dangerous, provided the danger is known. This is of course consistent with some of the authorities.

T. J. B.

SCOTCH CASES.

The rule which forbids a trustee from transacting with the trust estate in his charge was the occasion of Petition, in *Coats' Trustees* ([1914], 51 S. L. R. 642), in which the Court was asked to allow one of a body of trustees, who was a son of the testator, to purchase some of his father's valuable pictures, and for authority to the trustees to sell the pictures by public roup, with the permission that this trustee should be allowed to bid. The Petition was granted, but on condition that the pictures were not to be sold below upset prices equal to valuations already obtained by the trustees, a proviso which shows how particular the Court were that the sound rule of the Common law should not lose its effect.

In a recent case regarding an agricultural reference to settle certain claims at the expiration of a lease (*Gibson* v. *Fotheringham* [1914], 1 S. L. T. 461), it was recognised that procedure in such arbitrations might be much less solemn than in arbitrations proper. The Court adopted the remark made by Lord Low in the case of *Davidson* ([1908], S. C. 350), which also concerned an agricultural arbitration, "If it appeared that the parties had obtained the honest opinion of the gentlemen selected on the questions submitted to them, I should not regard mere irregularities of procedure as being sufficient to nullify the award."

If incapacity result from an injury to a workman, it is not relevant for the employer to argue that the incapacity is not the natural or probable consequences of the accident. The question is, did incapacity in fact result? An extraordinary application of that rule is *Clark* v. *Taylor & Co.* ([1914], 51 S. L. R. 418). A miner had been injured, but he had recovered from the effects of the actual injury, but as he had a disposition to obesity, his obesity increased during the time that he was idle during the injury, so that, even though the effects of the injury itself had passed away, he was still unfit for his work as a miner, and was only fit for work of a more or less sedentary character, such as a watchman. The First Division of the Court of Session held by a majority that, in these circumstances, the Sheriff Substitute was not entitled to find that the workman's incapacity resulting from the original accident had ceased, and to end the compensation. The House of Lords has now reversed the judgment of the Court of Session, and confirmed the finding of the Sheriff Substitute (*Taylor & Co.* v. *Clark*, L. J. 454).

The case of *Gordon* v. *Hansen* ([1914], 2 S. L. T. 5), recently decided by a bench of seven judges, is one of much importance to the trawling industry. A foreign trawler was suspected of fishing within the three-mile limit, and was ordered by the Master of a Fishery Board cruiser to proceed to the nearest port, which was Cromarty. The skipper refused, and was subsequently apprehended and charged in Elgin Sheriff Court with (1) illegal trawling and (2) failing to obey the order given. The Sheriff found the charge of illegal trawling not proved, and he further held that as the trawler was not doing anything illegal she was not bound to obey the order given by the officer of the cruiser. An appeal was taken as to the latter part of the Sheriff's judgment, and the Supreme Court have unanimously held that the validity and

legality of the order given by the Master of the Fishery cruiser did not depend on the offence of illegal trawling being subsequently proved, but that if the Fishery officer's suspicions were reasonable, as in this case they were, then the order to proceed to the nearest port was lawfully given, and failure to obey it was a contravention of the statute.

A member of a trade union presented a note of suspension and interdict against the trustees of the union, and the union itself, craving the Court to interdict them from collecting from members of the union contributions or levies for political purposes. During the dependence of the action the complainer died, and his widow, who had been appointed his executrix, applied to be allowed to carry on the action, but the Court refused, as the widow had no interest whatever in the merits of the action. (*Martin* v. *M'Ghee, and others* [1914], 51 S. L. R. 499.)

The criterion of when an accident to a seaman returning to his ship does or does not arise out of his employment, namely, has he got to his ship's gangway, was rigorously applied in *Craig* v. *Cormack* ([1914], 51 S. L. R. 659). A seaman, returning to his ship, was about twelve feet from the gangway when he fell into the water and was drowned. The Court held that the accident arose in the course of deceased's employment, but there was evidence to warrant the arbitrator's finding that it did not arise out of the employment. "It arose from a risk common to everyone, namely, that of falling from the edge of a quay into the water." It is not enough to say that the accident would not have happened if the man had not been engaged in the particular employment, or if he had not been at that particular place: it must be in some way specially connected with his work and employment. Had he

reached the gangway the case would have been different; the gangway was the access provided from the quay to the ship, and formed part of the employer's premises. The danger of crossing it is a risk arising out of a seaman's employment, as it is not one to which the general public are exposed. On the other hand the risk of falling from a quay is common to everyone.

D. M.

IRISH CASES.

In re Chute's Estate ([1914], 1 Ir. R. 180) is an interesting case upon questions of priority and marshalling. The facts, although not really complicated, require to be stated at some little length. In 1894, Q. mortgaged to a Bank certain lands and a policy of insurance, to secure all moneys then due or to become due by him, with interest. In 1897, Q. as beneficial owner mortgaged the lands to F., to secure £700 and interest; F. had notice of the Bank's mortgage. He gave notice to the Bank of his mortgage on 17th March 1897; at that date Q. owed the Bank £1,963. This sum was also secured by promissory notes at three months, which had originally been given in 1895 and 1896; the practice was, that as the notes became due they were debited to Q.'s current account, then at once renewed and the amount credited to him. Such renewals continued until 1903, and the notes remained unpaid. After the 17th March 1897 Q. paid into the Bank £4,000. His account was closed in 1904, when there was an overdraft of £1,654, besides the amount due on the notes. Q. died in 1908; the Bank then received the policy-moneys, and claimed to apply them to discharge the overdraft of 1904, leaving £1,963 and interest still charged on the mortgaged lands.

It was held, in the first place, that F.'s mortgage had priority over the Bank's charge. Applying the principle of *Hopkinson* v. *Rolt* (9 H. L. C. 514), advances made by the first mortgagee after notice of a second mortgage are not charged upon the property in priority to the subsequent mortgage. The rule in *Clayton's Case*, which is a rule of evidence giving rise to a rebuttable presumption capable of being displaced by evidence of a contrary intention, was held not to be excluded. That rule is conveniently stated in *In re Sherry* (25 Ch. D. 692): "Where a creditor, having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to that account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account." Further, F. was held entitled to compel the Bank to discharge *pro tanto* the debt due to them, on the 17th March 1897, out of the policy-moneys, in exoneration of the lands.

A gift will be charitable if its general object is charitable, although a limited class of persons have a preferential claim to benefit thereunder. *Concannon* v. *Attorney-General* ([1914], 1 Ir. R. 194), is an illustration of this principle, established since the decision in *Attorney-General* v. *Sidney Sussex College* (L. R., 4 Ch. Ap. 722). A testator gave the sum of £600 to St. Jarlath's College, a religious and educational institution which had no trustees, no deed of foundation, and whose affairs were administered by a council. The interest on this sum was to go for ever towards the education of the testator's relations in that college, preference being given to the most eligible and best conducted, the selection being made by the

Archbishop of the diocese for the time being, by "a conscientious layman," and by the parish priest of the boy to be considered. This was held a valid charitable bequest, but as there were no trustees, the amount was directed to be paid to the Commissioners of Charitable Donations and Bequests. They were allowed to pay the income to the college, who might apply it to their general collegiate purposes, subject to the duty of educating one relative of the testator, whenever such a person should be forthcoming and reasonably eligible.

Necessity makes even a Liberal Attorney-General acquainted with strange bed-fellows; and there is something rather pathetically ingenious in the attempt to make the Statute of Northampton (3 Edw. III, c. 3) applicable to the present state of Ireland. That statute provides, amongst other things, that no person shall "go nor ride armed, by night or day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere." The primary penalty appears to be the forfeiture of the offender's armour, but imprisonment is also possible. In *Rex* v. *Smith* ([1914], 2 Ir. R. 190), the prisoner had discharged a loaded revolver on or near a highway, apparently with the intention of frightening a certain person. No one but that person and the prisoner was on or near the high road at the time. An ordinary indictment for shooting at that person would seem to have lain. The actual indictment preferred contained three counts, the first alleging that the accused "did go about on the public road armed, not being one of the King's servants or ministers," the second that he "did go about on the said public road armed in public without lawful occasion, in such a manner as to be a nuisance to and alarm the public lawfully using the said road, against the peace, &c.;" and the third, that he "did unlawfully discharge a loaded revolver to the great danger of the public." The Court for Crown Cases Reserved held

that the omission to negative lawful occasion made the indictment bad, as omitting an essential ingredient of the offence, and that this omission was not cured by verdict. "This old statute," said Palles, C.B., "must be pleaded according to its construction." The statutable misdemeanour is to ride or go armed (*a*) without lawful occasion, and (*b*) *in terrorem populi*; the indictment should negative (*a*) and conclude with (*b*).

The fiction of service upon which the action of seduction is founded will not be extended (*Barnes* v. *Fox* [1914], 2 Ir. R. 276). A father sued for the seduction of his daughter, who had been engaged by the defendant's wife as a domestic, on the terms that during the wife's absence from home the girl was to go back to her father's house, and remain there unless called on to perform household duties in the defendant's house. During one of these periods of absence she was called to the house by the defendant, and there seduced by him. She remained in the service of the defendant's wife, and her confinement took place in the defendant's house. It was held that a verdict was rightly directed for the defendant. "The cause of action does not arise from the mere sexual intercourse. If pregnancy does not follow, no action lies. The wrong is the diminished capacity to serve, arising from the pregnancy." This being the damage, and damage being of the gist of the action, the girl was at all material times during which this damage occurred, in the service of the defendant and not in that of the father.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Law as a Means to an End. By RUDOLPH VON IHERING, late Professor of Law in the University of Göthingen. Translated from the German by ISAAC HUSIK, Lecturer on Philosophy in the University of Pennsylvania, with an Editorial Preface by JOSEPH DRAKE, Professor of Law in the University of Michigan, and with Introductions by HENRY LAMM, Justice of the Supreme Court of Missouri, and W. M. GELDART, Vinerian Professor of English Law in the University of Oxford. Boston: The Boston Book Company. 1913.

This book is Vol. V of the Modern Legal Philosophy Series, edited by the Editorial Committee of the Association of American Law Schools. In noticing the earlier volumes of this admirable series we stated that the chief purpose of the Committee is to present to English readers the most representative views of the most modern writers in jurisprudence and philosophy of law.

The earlier volumes by Dr. Berolzheimer and Professor Miraglia, which we have already commended to readers of this *Review*, which survey the various schools of thought and the evolution of legal ideas, together with a summary of the history of general philosophy, form a sufficient introduction to later volumes such as the present.

Of Ihering's numerous works, two have already been translated into English, the one entitled *The Struggle for Law*, by John J. Lalor, of the Chicago Bar, the other entitled *Law in Daily Life*, by Dr. Goudy, Regius Professor of Civil Law, Oxford. The work here presented is a translation of the fourth German edition of the first volume of *Der Zweck im Recht*, published in 1903. The principle proclaimed by Ihering in his *Law as a Means to an End*, or more literally, "Purpose in Law," has never yet, except perhaps by Bentham, been so clearly enunciated. This work was the result of Ihering's revolt from the juristic tendencies in Germany in the middle of the nineteenth century. Puchta had endeavoured, it is true, to fashion the legal principles evolved from the historical study of Roman law by Savigny, into a philosophical system and to crystallise them in a body of dogmatic juristic doctrine.

Ihering saw clearly that law was not an end in itself. The end is the good of society. In the recent developments of legal ideas under the lead of English and American legal scholars, the same tendencies now prevail as in Germany when von Ihering's book first appeared in 1883. As Professor Drake points out, many American jurists, both on and off the Bench, apply the principles which have been worked out in the development of the Common law as though they were *à priori* mathematical problems and not *à fortiori* working formulæ, which require to be constantly reshaped to adapt them to the ever-changing demands of a developing society. Active as the Legislature has been in the United Kingdom, much of the evil of a divorce between law and the life of a community remains. As Professor Geldart rightly insists, law is a very esoteric science. This isolation from philosophy is bad for both law and philosophy, however much our jurists may ridicule the possibilities of directing by philosophic provisions the development of law in the future. Professor Drake is only repeating the cry now frequently heard in the United States against the crystallised and inelastic theory and practice of law which prevail. Both here and in the States a von Ihering is needed, to teach not only what the law is and has been, but the principles of what the law ought to be.

A Commentary on the Canadian Law of Simple Contracts. By W. WYATT PAINE. London: Sweet & Maxwell. 1914.

To those unacquainted with Canadian legal literature it will no doubt appear strange to find a work of this description written by an English practising barrister. It appears, however, that not only are there few legal text-books by Canadian lawyers in existence, but such as do exist are usually of inferior merit and not kept up to date. Thus the way was clear for a treatise dealing scientifically and exhaustively on the Canadian law of Simple Contract, upon the lines and conforming to the high standard of excellence attained by the leading English text-books. In the preparation of this work, the primary object of the Author has been to provide practitioners with an exhaustive review of all those matters relating to his subject which are of common occurrence in business, and consequently of the highest practical utility. Matters of exceptional occurrence, although not so fully discussed, are treated at sufficient length compatible with lucidity. With the exception of Quebec, the English Common law prevails throughout the Dominion, and in

the majority of the provinces so much of the English Statute law relating to civil matters as was operative prior to the particular date specified in the adoptive Act of each province. The present work is designed as a companion volume to the 16th edition of *Chitty's Treatise on the Law of Contracts*, of which Mr. Wyatt Paine is editor. Throughout the work marginal references are given to those pages of that work in which similar points are discussed.

If we may point to the treatment of one subject more than another for approbation, it is that of "Principal and Surety," in which a most original and sound discussion on the law is to be found. But why does Mr. Wyatt Paine regard a *nudum pactum* as equivalent to an agreement without consideration? It means in Roman law something quite different. The Rules prescribed by the Judicial Committee of the Privy Council for regulating appeals from the Provincial Courts to the Privy Council, and the Rules of 1906 regulating appeals to the Supreme Court of Canada, are contained in the final chapters, and will be found both accurate and up to date. It is difficult to see how in the arrangement of the subject, or in the statement of the law, this work could be improved. It should find a ready acceptance from practitioners in the great Dominion.

Burgage Tenure in Mediæval England. By MORLEY DE WOLF HEMMEON, PH.D. London: Oxford University Press. 1914.

This monograph, based partly on a thesis accepted for the Doctorate by Harvard University in 1908, and partly on a series of articles which appeared in the *Law Quarterly Review* in 1910 and 1911, contains much new matter the result of original research. Hitherto, although the tenure of land in the boroughs has received some attention from such writers as Pollock and Maitland, and Miss Bateson, no one in England has as yet attempted its separate treatment. In Dr. Hemmeon's opinion the legal side of this tenure has been too much neglected for the political, and when dealt with at all, too little understood. One cause for this neglect and misunderstanding lies in the old theory that burgage tenure was only a species of common socage tenure, a classification for which Coke is largely responsible. This definition, says Dr. Hemmeon, must be reversed, for burgage tenure shows greater age in the survival of at least one archaic custom, viz., military heriot; and it is more logical as well as nearer in line with fact to regard each as the descendant of a

common ancestor. In this book, speculation as to the origin of burgage tenure has been avoided, only, we hope, to be dealt with by Dr. Hemmeon in a later work. Here the connection between, and the comparison of, the burgage and the feudal tenure are made with regard to the extent to which the former was affected by the incidents and other concomitants of the latter, or by the incidents of villeinage. The purely economic phases of the tenure are considered, such as the amounts and incidence of quit-rents and rents and prices of realty. This is followed by a discussion—perhaps the most important feature—of its freedom of sale and devise. Finally, a comparison is drawn between urban tenure in England with that in parts of France, in the Netherlands, and in Germany.

The American Doctrine of Judicial Supremacy. C. G. HAINES, Ph.D. New York: The Macmillan Company. 1914.

The object of this treatise is to present, in brief compass, the history, scope, and results of judicial control over legislation in the United States. The author's aim has been to bring together for consideration the principles which have developed in connection with judicial review and to suggest some of the results which these principles have had upon governmental practice, rather than to deal exhaustively with any single phase of the subject. In order to present an accurate survey of the development of the practice of declaring legislative acts void, the Author has found it necessary to quote fully from early precedents as well as from the opinions which were either favourable or unfavourable to the American doctrine. The source of this power of judicial control is traced from the ancient and mediæval concept of the law of nature, from the idea of a higher law made vital and attractive in Sir Edward Coke's theory of the supremacy of the Common law Courts, and from the precedents during colonial and revolutionary times, until its emergence as a recognised principle of American constitutional law. Special attention is given to the differences between the power as conceived by judges in the 18th and early 19th centuries and the practice of judicial review in the last few decades. The opposition encountered in the early years of judicial control and in subsequent periods of American history is reviewed, including a discussion of recent criticisms by justices, by labour leaders, and by socialists. Data from many sources, relative to the theory and practice of judicial review, is brought within brief compass, so as to be readily available to lawyers and politicians alike.

In view of the growing hostility in the United States to the American doctrine of judicial supremacy, which is regarded by the masses as forming an insuperable barrier to progress and economic freedom, the appearance of this book is most opportune, and should prove invaluable in formulating public opinion and suggesting the remedies.

The Law of Associations Corporate and Unincorporate. By HERBERT A. SMITH, M.A. Oxford: The Clarendon Press. 1914.

The question of the extent and content of the rights and liabilities of men acting together in association has once more come up for discussion. Large questions of Church and State, of capital and labour, as well as more purely academic problems, are involved in the rules which the Legislature and the Judicial Bench may frame upon the "law of associations." Not that the latter is yet recognised as a separate division of English law. With a law of corporations we are familiar, but we must go to the Middle Ages to find the "law of associations" as a substantive part of English law. With the law as it exists we have little reason to be proud. A law of corporations which tolerates and is compelled to legalise a one-man company, whereby the "one-man" who had secured a charge on the assets of the company was preferred to the creditors (*Salomon* v. *Salomon*, L. R. [1897], A. C. 22), is not entitled to much respect. A solution of the present chaotic condition of the law relating to corporate and incorporate associations is of immediate concern, and any discussion which helps in realising some general theory of juristic personality bearing some approximate relation to the facts of life and with modern concepts, is eminently desirable. Both the practising lawyer and the jurist will derive pleasure and advantage from this admirable exposition of an exceedingly delicate and complicated problem.

Bowles v. *The Bank of England*, with an Introduction. By T. GIBSON BOWLES. London: Butterworth & Co. 1914.

Mr. Gibson Bowles, no doubt, imagines his name will be handed down through the ages to come as another Hampden, who has shattered the divine right of officialism claimed by an arrogant bureaucracy, inspired by unscrupulous ministers of the Crown, to extort vast sums of money from the taxpayer without grant of Parliament! Hence the famous Case of *Bowles* v. *The Bank of England*, the chief result of which was to inflict heavy legal costs

upon the unfortunate taxpayer. Technically Mr. Bowles succeeded in abolishing a practice by which income tax had been collected on the faith of resolutions passed by the House of Commons, but before it was authorised by statute. This practice had been followed by both parties for generations without the taxpayer being a penny the worse, and without any idea in anybody's mind that he was being taxed without his consent. Mr. Bowles also makes it a grievance against the Government that his costs were severely taxed and only repaid in part. Why the Government should go out of its way to favour Mr. Bowles above all other litigants, after being put to such serious embarrassment and expense by his unnecessary proceedings, we fail to comprehend. A real Hampden would say nothing about taxation of costs.

Methods of Land Transfer. By Sir C. FORTESCUE-BRICKDALE. London: Stevens & Sons. 1914.

This book consists of lectures delivered by the learned Author last year at the London School of Economics. It is limited to the discussion of transfer of land *inter vivos*. This is sufficiently large of itself, containing as it does, no less than four clearly distinguishable systems, each working on a large scale side by side, viz., Private Conveyancing; Manorial Conveyancing; Registration of Deeds; and Registration of Title. It is interesting to note that Sir Charles is in favour of putting an end to this competition, and of making a final choice of the best of the four. It is hardly necessary to say in which direction Sir Charles leans. Our prevailing method is undoubtedly expensive, and undoubtedly dilatory: it is far from perfect as regards accuracy and security: it is full of complication and technicality, and with four different systems at work, the resulting confusion of principles and practice far outweigh any supposed advantage. The registration system, he declares, is one of the most important legal inventions of the present age. It has been publicly proved by the uncontested and incontestable evidence of the entire body of landowners who have used it. It is simple, accurate, secure, cheap and expeditious. Whether one agrees with Sir Charles on this or not, his treatment of the systems as they exist in this country and in the Dominions, the United States, and on the Continent, is altogether admirable. From these lectures the law student and layman alike will derive a clear and comprehensive view of land tenures and of land transfer.

Code of Mohammedan Personal Law according to the Hanafite School. By MOHAMMED KADRI PASHA. Translated by WASEY STERRY, M.A., Chief Judge of the Sudan, and N. ABCARIUS, Ph.M., LL.B. London: Spottiswoode & Co. 1914.

The present work is a translation of the Code of Personal Law of the Hanafite School of Moslem Jurisprudence, compiled by Mohammed Kadri Pasha, and in use in the Mohammedan Courts of Egypt and the Sudan. Although British magistrates in the Sudan have ordinarily no jurisdiction to decide questions of Mohammedan law, the want of an authoritative guide upon Mohammedan law is often found inconvenient in the course of hearing cases within their jurisdictions. It is interesting to learn that the founder of the Hanafite School, Iman Abu Hanifa Nu'man Ibn Thabit, was born at Kûfa in Irak, in 702, and died in 768; that his two disciples, Iman Abu Yusuf and Mohammed Ibn Husein, were adopted by the Abbasid Khalifas of Baghdad, and later by the Ottoman Khalifas, and thus Hanifa's doctrines became officially recognised in the Ottoman Empire. But for this, the more conservative Maliki doctrines which arose in Arabia and are now followed in North and West Africa, would have prevailed in the Courts of Egypt and the Sudan. Apart from the purposes for which this book is intended, it will be found useful by students of Comparative law. Of the fidelity of the translation we are unable to offer an opinion.

The Rules of Law and Administration relating to Wills and Intestacies. By C. P. SANGER. London: Sweet & Maxwell. 1914.

The object of this book is to state concisely the rules which should be known by all who administer the estates of deceased persons. It is confined to the exposition of those elementary rules which are to be applied in the administration of the estates of deceased persons, where, on the face of the will (if any) there is absolutely no obscurity or ambiguity. Such obscurity or ambiguity may be solved by reference to the well-established rules of construction to be found in *Hawkins on Wills*, of which Mr. Sanger is the present editor; if not it is safer to take the opinion of the Court. So, too, the subject of parol evidence is not treated in this book, except incidentally. Under the title of "intestacy," Mr. Sanger treats of the rights of husband and wife, the heir-at-law and the next-of-kin. The difficulty of the subject, declares Mr. Sanger, is largely due to the fact that the English law of Real Property is technical, obscure,

and unsuited to the needs of a civilised nation. This was discovered by some of our Colonies years ago; for instance, in New Zealand, by the Land Transfer Act 1870, by which the land was freed from the trammels of the English law of Real Property and the method of transfer assimilated to that regulating dealings with ships and stocks and shares and other personal property. It is an anomaly and a scandal, as Mr. Sanger points out, that such artificial distinctions between Real and Personal Estate should be tolerated. As the law now stands, land held for a term of 999 years, at a peppercorn rent, is personal property.

The Mechanics of Law Making. By Sir COURTENAY ILBERT, G.C.B. London: The Oxford University Press. 1914.

This volume consists of the Carpentier Lectures delivered by the Author last year in the University of Columbia, together with some additions from Sir Courtenay's well-known work *Legislative Methods and Forms.* The sins of the Legislature are often laid upon the backs of the unfortunate Parliamentary draftsmen. Journalists and other members of the public are in the habit of talking loudly of the carelessness and slovenliness of the draftsmen who leave important questions in Acts of Parliament so obscure that another Act of Parliament is required for their elucidation. That these charges are not always well-grounded Sir Courtenay shows by a delightful story of the way in which the right of the women to be elected to County Councils under the Local Government Act of 1888 was deliberately left undefined It was the end of the session and an exceptionally hot July and every one was tired. Sir Courtenay, himself the draftsman, pointed out the omission. The minister in charge was advised by his whips that an amendment raising the question would mean a three days' debate and the bill would run a serious risk of being lost. The two front benches conferred and agreed not to raise the question. No one else made any objection, and so the Bill became law with the doubt unresolved. As Sir Courtenay properly points out in the final chapter, an ordinary Act of Parliament is essentially a creature of compromise. Considering the conditions under which they are produced, it is really wonderful our English statutes are as good in form as they are. It is not so much the draftsman who deserves the blame as the circumstances, the methods by which, and the persons through whom, measures reach the statute book.

A Chance Medley. By "JUNIOR DEVIL." London: Constable & Co. 1914.

This is a reprint of a book published in 1911, which was itself a reprint of the well-known contributions entitled "Silk and Stuff" in the *Pall Mall Gazette* during the years 1893 to 1909. These extracts are arranged under such titles as *Historical; The Inns of Court; Judges and Lawyers; Trials and Appeals; Legal and Constitutional Points; Legal Stories*, etc. In spite of this arrangement, however, the book remains a somewhat chaotic collection, similar to the older antiquarian works. None the less it will appeal to the student of legal history, both ancient and modern. It is crammed full of ancient law and *bon mots*, many of the latter being comparatively new. These extracts are, on the whole, remarkably accurate, but mistakes occur here and there. For a parallel to a judge being a party to a suit in his own Court, as in Lord Moulton's case, we need not go back to Chief Justice Holt's case in 1693. We need only recall the case of *Adams* v. *Coleridge*, when Lord Chief Justice Coleridge appeared as a defendant in his own Court in an action for libel. So, too, the story of the deaf juror should be credited to Lord Brampton and not to Lord Chief Justice Coleridge. The Author is a well-known member of the Bar who prefers to retain his *nom de plume*.

The Law of Naval Warfare. By J. A. HALL, LL.B. London: Chapman & Hall. 1914.

The Author is a member of the Bar and also holds a commission in the Royal Naval Volunteer Reserve. His book is a short statement of the rules with which naval officers must comply in time of war, if international complications are to be avoided. He has attempted to state established principles without argument, and he appears to have succeeded very well. Authorities, few but sufficient, are cited, and our Author upholds succinctly the legal character of International law, and condemns the doctrine of *Kriegsraison*. But he is mistaken in asserting positively that British goods are free to go to the enemy in a neutral ship. The Declaration of Paris does not say so, and it is inaccurate to assert that the ground of condemnation in such cases was that the goods were "equivalent to enemy goods." They were condemned because of the dangers of such an intimate correspondence, as will be apparent on a careful study

of the cases. Not until *Esposito* v. *Bowden* do we find any other reason given prominence. And we can scarcely see how Joseph Story can be called Lord Stowell's "prototype." The Author ventures upon debateable matter when he asserts that the paralysis of industrial affairs is the clinching argument of war. The argument is invoked in order to justify naval interference with commerce; but it is pretty clear that interference with sea-borne commerce never produced much effect on the issue of a war. What does bring a nation to terms is interference with its government, the dislocation of the nerves of power. Nor do we think him right in holding that a merchant ship may not begin an attack. Kent thought otherwise: an attack may be the only hopeful defence Also, the Author countenances the heresy that an undefined "body of men" can claim the protection due to prisoners by simply displaying a white flag, which is the proper sign of a flag of truce. Our most serious point of difference with him, is that in approving the application of the doctrine of continuous voyage to contraband, he fails either to quote the *Imina*, or to acknowledge that Britain paid Germany damages for her interference with the ships bound for Delagoa Bay. Again, it seems quite impossible to sustain that a neutral ship is confiscable for communicating with the enemy, whether by wireless or otherwise This is a very different thing from being devoted to his service as a despatch-carrier; and would, if followed to a logical conclusion, prevent all intercourse with the enemy's territory.

On the difficult question of enemy character in time of war, he is not clear. First speaking of it as constituted by residence plus trading in the enemy's country, he proceeds to throw overboard, first residence, and then trading ("a hostile trade-domicile dependent on *residence alone*")—leaving the subject in the condition of a concept deprived of its attributes. It is a small point, but the captor of a neutral vessel is *not* entitled to interfere with the colours. (See Moore, *International Law Digest*, II, 280.)

As the Author truly says, the problems of International law presented to the naval officer are more varied, more frequent and more disputable than those placed before his brother in the army. That the foregoing are the only points which seem to call for adverse comment is a great tribute to the concise ability with which Mr. Hall has marshalled the rules on so difficult a topic.

Urkundenbuch Zum Seekriegsrecht. By Dr. T. NIEMEYER. Berlin: J. Guttentag. 1913.

This work, of three volumes, is devoted to an extended compilation of the sources bearing on questions of Prize Law and Warfare at Sea. Much of these are in English and French, as the original languages of the documents. The first period treated of is that of the Armed Neutrality of 1780—we should have liked to have had it preceded by the Declarations of the Northern Powers, designed to constitute the Baltic a close and neutralised sea—and the work proceeds through the period of the Berlin and Milan decrees to that of the Congress of Paris and the recent Peace Congress of the Hague. The debates of the Committees of these Conferences are given in French, and fill the two later volumes. The Editorship of Professor Niemeyer is a guarantee that the necessary work of selection has been admirably accomplished. Of course the work is not exhaustive. The many commercial treaties particularising the categories of contraband find little or no place in its pages; nor do the various naval instructions issued by Governments. It does not pretend to take the place of a library, but it forms a very handy and convenient manual for consultation by those who are interested professionally or academically in the topics with which it deals, and as such it can be cordially recommended to our readers.

Second Edition. *Selected Cases illustrating the Law of Contracts.* By ARTHUR C. CAPORN, LL.B., and FRANCIS M. CAPORN. London: Stevens & Sons. 1914.

Part I of this book, dealing with the Principles of Contract, is by Mr. Arthur C. Caporn, whilst he and Mr. Francis M. Caporn are jointly responsible for Part II, which treats of Special Commercial Contracts. It is now generally admitted that there is no better way of teaching students the general principles of law than sending them direct to the Law Reports. But even when access to them is easy, the student is apt to spend too much time on unimportant issues, and to run the chance of losing the point in the mass of detail. In this edition the whole work has been thoroughly revised and brought up to date, a considerable portion having been re-written. By compressing some of the cases, room has been found for new chapters dealing with "Bills of Sale," "Insurance Guarantee," and on "Carriage of Goods at Sea." Part II does not profess to cover all branches of Commercial law, but only those considered

to be the most important classes of contracts usually met with in commercial life. The authors are far from eclectic. They select their cases with equal impartiality from the Law Reports of New York, and from the Year Books of Edward IV, or from the English Law Reports.

Second Edition. *The Law of the Stock Exchange.* By W. S. SCHWABE, K.C., and G. A. H. BRANSON, assisted by LIONEL SEYMOUR. London: Butterworth & Co. 1914.

There are few of us who have not been forced, either for ourselves or as trustees, to deal in stocks and shares, and the notice on the Contract note: "Subject to the rules of the Stock Exchange," conveys an air of mystery as to the doings of that august body of individuals. It has been the duty of the learned Authors to draw back the veil and to show us the inner workings. Mr. Schwabe is well known as a commercial lawyer, and Mr. Branson is the Attorney-General's "devil." The first edition had the assistance of the present Lord Chief Justice, so that the foundations of this treatise were "well and truly laid." The text is divided into six chapters. Chapter I gives an account of the Constitution of the Stock Exchange, and in Chapter II is described the nature of Stock Exchange Securities. In Chapter III we have outlined the course of business, and Chapter IV, perhaps the most important in the book, places before us the relationship existing between the Stock Exchange and the public. The vexed question of Gaming and Wagering appears in Chapter V, and Chapter VI initiates us into the mysteries of Market Making, Rigging, and Corners, dealing also with Fraud. On page 273, *et seq.*, we have set forth the Rules and Regulations of the Stock Exchange, which have to a large extent been remodelled of late years, many important changes having been introduced. The cases have been brought up to date, and the effect of them incorporated into the text. The language in which this treatise is written is lucid, simple, and largely free from technicality, a feature which will insure a large reading public.

Second Edition. *Letters on War and Neutrality.* By T. E. HOLLAND, K.C., D.C.L. London: Longmans, Green & Co. 1914.

It is satisfactory to note that a second edition has been called for of Professor Holland's cogent contributions to the press on topics of Public Law. In the present volume are included additional

letters of the past four years. These are mainly on the Naval Prize Bill and Foreign Enlistment Bill, but also touch on questions of German War *Matériel* for Turkey and the Stoppage of the Dardenelles. Every word that Professor Holland writes deserves to be carefully weighed; but we think that the explanatory notes might well have been a little longer and more elaborate: they are limited to what is absolutely necessary for the understanding of the text. Professor Holland is to be congratulated on having effectively secured the reconsideration of some very mischievous projects in legislation.

Third Edition. *The Law of Banking.* By HEBER L. HART, K.C., LL.D. London: Stevens & Sons. 1914.

The present edition of this exhaustive treatise has been rendered imperative, not only by the lapse of time since the previous edition in 1906, but by the numerous changes in the law which have taken place during the interval. The new statutes affecting the Law of Banking include the Bills of Exchange (Crossed Cheques) Act 1906, and the Bankruptcy and Deeds of Arrangement Act 1913, whilst the new cases number more than three hundred and fifty. The latter range from the *Colonial Bank of Australia* v. *Marshall*, decided in 1906, to *Morison* v. *London & County & Westminster Bank*, in which judgment was delivered by the Court of Appeal only the other day. In these decisions are to be found matters of primary importance in banking circles, and to all business men. The action of the Courts, says the learned Author, has necessarily been circumscribed by previously established rules and precedents, and could not reasonably have been expected to prove specially favourable to bankers. On the other hand, the Legislature has distinctly marked its sense of the substantial advantages derived by the public from the activities of banks, and evinced its willingness to remove unnecessary difficulties from the conduct of their ordinary work. Without committing itself to any definition of the business of banking, it has succeeded in prohibiting the money-lender from professing to carry it on, and without determining the distinctive characteristics of banking companies, it has endowed them with the capacity of becoming custodian trustees. At the same time it is well to remember that the bankers are only money-lenders of a higher class, and the number of millionaire bankers is evidence of the highly

remunerative nature of their business. By the statutes above referred to, bankers have been relieved of the risk involved in the collection of cheques and in dealing with insolvent or bankrupt persons. For these privileges it would have been only fair to have made some provision for the transfer to the State of unclaimed property remaining in their hands In addition to the insertion of new matter necessitated by fresh legislation and judicial decisions, Mr. Heber Hart has thoroughly revised the text, and has dealt, either for the first time, or more fully than previously, with several important subjects. "The Law of Stock Exchange Transactions," in the Appendix, is a model of clear statement, but it seems doubtful whether such a complicated subject can be adequately and effectively treated in an Appendix.

Fifth Edition. *Kerr's Law and Practice of Injunctions.* By J. M. PATERSON, M.A., LL.M. London: Sweet & Maxwell. 1914.

Eleven years have elapsed since the publication of the last edition of this standard text-book, and during this period a vast number of cases have been decided and numerous Acts passed affecting the law and practice of injunctions. This has caused an increase in the bulk of the book of no less than 90 pages. The change in the law and practice since the appearance of the first edition of this work by the operation of the Judicature Act and otherwise is such, that we cannot help thinking the opportunity should have been seized by the present Editor to discard the original work and entirely re-write it. By this course valuable space might have been saved, much of which is now devoted to the discussion of such subjects as the law of waste and trespass. To treat such subjects fully in a work limited to the law of injunctions is obviously impossible, and a cutting down of some of this alien matter would not have lessened the value of the work. Apart from these criticisms, which are offered in no captious spirit, this work may be commended as both accurate and complete. The law and practice are stated with exceptional lucidity and supported by a wealth of authority. A somewhat unusually large number of cases which were reported too recently to be embodied in the text are given at pp. lix—lxiii. References to the Revised Reports, which add materially to the usefulness of the work, are included in the present edition.

Fifth Edition. *The Companies Acts 1908 and 1913.* By D. G. HEMMANT. London: Jordan & Sons. 1914.

Since the publication of the last edition of this eminently useful treatise upon the law relating to limited companies, the Companies Act 1913 has been passed, and certain minor provisions of the Act of 1908 repealed and substantially re-enacted in other statutes. By the Act of 1913, the defect revealed by *Park* v. *Royalties Syndicate* (L. R. [1912], 1 K. B. 330), has been remedied. In this case it was decided that, provided the prescribed provisions were contained in the Articles of Association, the company was a private company, whether the provisions were carried out or not. The Act now provides that, if a private company makes default in complying with these provisions, it will cease to be entitled to the privileges and exemptions conferred on private companies by the Act of 1908.

Amongst the provisions of the Act of 1908 which have been repealed, is that relating to the winding up of limited partnerships. Such partnerships are now, by the Bankruptcy and Deeds of Arrangement Act 1913, subject to such enactments of the Bankruptcy laws, modified by the general rules, as apply to ordinary partnerships. The present edition has been thoroughly revised and brought up to date, and the Author is to be congratulated in adding some 130 new cases without appreciably increasing the size of the book. Two important cases, reported whilst the book was in the press,—*In re Sandwell Park Colliery Co. Ltd.* (L. R. [1914], 1 Ch. 589), and *Warner International, etc. Engineering Co.* v. *Kilburn, Brown & Co.* ([1914], W. N. 61),—appear as Addenda. The explanatory notes to the principal Act appear to us to be exceptionally well written, clear and succinct. They should prove very welcome to all engaged in company work.

Seventh Edition. *Student's Bankruptcy.* By A. WELDON and H. G. RIVINGTON, M.A. London: The "Law Notes" Publishing Offices. 1914.

Eleventh Edition. *The Principles of Bankruptcy.* By R. RINGWOOD, M.A. London: Stevens & Haynes. 1914.

The hurried passing of the Bankruptcy and Deeds of Arrangement Act 1913 (3 & 4 Geo. V, c. 34), which came into force April 1st, 1914, has necessitated new editions of works on that subject. That Statute is far reaching in its effects, and it is a pity that more consideration was not expended on some of its provisions, which are far

from clear. Mr. Weldon is well known as being one of that famous pair of law coaches in Chancery Lane, Messrs. Gibson & Weldon, and so is fully qualified to compile a work for the use of students. The Summary of the Bankruptcy Acts, 1883—1913, together with the Bankruptcy Rules 1886—1914, and the Bankruptcy (Administration Order) Rules 1902, giving references to pages in the text where each section and rule is dealt with, appears to us to be an excellent feature. If we might venture one criticism, it would be that the type employed in the Index might be larger and printed with slightly wider spaces, the present system being rather trying to the eyes, and rendering it easy to overlook a reference. Otherwise the present edition is excellent, and is likely to prove of considerable assistance to the student in preparing for examinations. The Preface to the third edition of Mr. Ringwood's book states that it is intended for the use of law students and candidates for the examinations of the Institute of Chartered Accountants. This may have been true in 1884, but in 1914 it strikes us that it has grown more into a text-book, losing something of its elementary nature so essential to students. In saying this we do not seek to detract from its undoubted merits. Again, in Mr. Ringwood's book there appear excellent Summaries, with references, that we noticed in Messrs. Weldon & Rivington's work; it is a pity that the same system is not adopted in treatises on other branches of law. All that is essential has been fully noticed, the text and cases have been thoroughly overhauled and brought up to date. In short, this work may be confidently recommended as being excellent in every respect.

Seventh Edition. *Scrutton on Charterparties and Bills of Lading.* By Sir T. E. SCRUTTON and F. D. MACKINNON. London: Sweet & Maxwell. 1914.

Since the publication of the last edition of this standard work over sixty cases have been reported, and the effect of these has been embodied in their appropriate places in the text, which itself has been carefully revised where necessary. In the present, as in the last edition, certain typical forms of charterparties and bills of lading, which appeared in the earlier editions, have been omitted in order to save space. The great increase of material may be gauged from the difference between the first and the present edition. The former contained 325 pages, with references to 1,002 cases; the latter contains 473 pages, with references to no less

than 1,670 cases. The most important of recent decisions is that relating to the shipowners' liability for loss by fire. It is, as the learned Authors remark, singular that the shipowners' statutory exemption from liability for loss by fire, which has existed since 1786, should never have come before the Courts until the case of *The Diamond* (L. R. [1906], p. 282), in which Bargrave Deane, J., decided that the shipper was not liable for negligence in overheating a stove, the cause of the fire, since the stove was perfectly safe when properly used. Much valuable information is contained in the Appendices relating to the practice in loading and discharging in the principal ports in Great Britain; the principal statutes affecting the contract of affreightment; general average; the United States Act of Congress 1893; and Acts of the Dominions beyond the sea. Commendation of this standard authority on an important branch of commercial law would be an act of supererogation.

Eighth Edition. *Daniell's Chancery Practice.* 2 Vols. By S. E. WILLIAMS and F. G. SMITH.

Sixth Edition. *Daniell's Chancery Forms.* By RICHARD WHITE, assisted by F. E. W. NICHOLS and H. G. GARRETT. London: Stevens and Sons. 1914.

The last editions of these two works, so indispensable to the Chancery practitioner, appeared as long ago as 1901, since which date many changes in the law and practice have taken place. Of the statutes which have been passed in this interval may be mentioned the Trade Marks Act 1908, the Public Trustee Act 1906, the Patents and Designs Act 1907, the Companies (Consolidation) Act 1908, and the Copyright Act 1911. Of the more important changes in the practice of the Chancery Division, the Supreme Court Funds Rules, the Rules Relating to Proceedings by Poor Persons, and the Rules Relating to Payment into Court, may be noted. The present edition is brought down to December 1913, and by Addenda, to March 1914, and includes the reported cases for the latter month, and the Rules of the Supreme Court (Poor Persons) 1914. The latter are in fact included in the text, and although the old rules as to paupers have been repealed, the Editors have wisely retained those decisions under the former practice, which they consider still relevant. A new feature of the present edition consists

of a Table of Rules and Orders, which should be found of considerable use in facilitating reference to the Rules of the Supreme Court. The changes in the law and practice referred to above have also affected *Daniell's Chancery Forms*, and rendered a new edition imperative. The forms and notes of the last edition, edited by the late Master Burney, have been considered, and, when necessary, revised and brought up to date, whilst those which have become obsolete have been omitted. The contemporaneous publication of these two works has enabled the Editors to make constant cross references and thus add to the value of each. References are also given to other works, such as *Seton's Forms*, *Chitty's Forms*, and *The Annual Practice*. To meet the requirements of recent legislation, numerous new forms have been added, such as those for working out a judgment in a debenture-holder's action, and in relation to applications under the Companies (Consolidation) Act 1908, and for use in connection with the Trade Marks Act 1905 and the Patents and Designs Act 1907. Forms suitable for carrying out the proceedings under the new Rules by poor persons are also included. A glance at the heading "Summons (Originating)" in the *Index* shows the increasing importance of proceedings commenced by originating summons. Confined originally to the simple case of an order for the administration of the personal estate of a dead man, the scope of an originating summons has been so enlarged by subsequent orders, that it now embraces such diverse subjects as charitable trusts, disputes under the Finance Act 1894, guardianship of infants, the Judicial Trustee Act, light railways, lunatics, married women's property, Settled Land Acts, the Trustee Act 1893, and Wards of Court. In these matters and the like, changes in the forms and practice are frequent, and as the practice grows up in chambers where reporters are not allowed to take notes, the necessity of having officials of the Court upon the editorial staff is apparent. It is interesting to recall the fact that the first edition of the *Practice* appeared in 1845, and of the *Forms* in 1867. From the first both these works attained a commanding position as standard authorities which they still retain. In the course of such a long period many changes occur in the editing staff. Of the Editors of the 1901 editions only Mr. Williams is left. He is well-known for his books, *Legal Representatives*, *Outlines of Equity* and *The Law of Accounts*. He is also the latest editor of *Coote on Mortgages*. The late Master Burney's place has been filled by Master White, also a Master of the

Supreme Court, who has had the benefit of the assistance of Mr. Nichols of Chancery Chambers, and one of the assistant editors of the *Annual Practice*, and of Mr. Garrett of the Chancery Registrar's Office, and one of the editors of *Seton's Judgments and Orders.* It will, we venture to think, readily be admitted that Messrs. Stevens & Son have succeeded in securing an editorial staff no whit inferior in knowledge of the law and practice of the Chancery Division to that of any of its predecessors. The publishers may be congratulated, no less upon the judgment shown in the selection of their Editors, than upon the enterprise exhibited in producing treatises of such magnitude and vital importance to the legal profession.

Sixteenth Edition. *Stephen's Commentaries on the Laws of England.* 4 Volumes. Edited by EDWARD JENKS, M.A., B.C.L. London: Butterworth & Co. 1914.

The learned Editor's hopes, expressed in his Preface to the last edition of this work published in 1908, for a substantial improvement in a future edition have been amply fulfilled. The great mass of recent legislation has alone involved a large amount of change, and the opportunity has been seized of making some radical re arrangements in order to render the work of more practical service to both students and practitioners. The most substantial changes in Volume I occur in Chapters XVII and XXVI on Title by Alienation and Death Duties on Land, which have been practically re-written by Mr. Bompas, who is also responsible for Chapter XIII, Registration of Deeds and Title to Land; and Chapter XXV, The Settled Land Act. The remaining chapters have been revised by the Editor. Professor Geldart is responsible for the first half of Volume II, the earlier portion of which has undergone considerable modification in incorporating the provisions of the Copyhold Act 1911 and the Bankruptcy and Deeds of Arrangement Act 1913. The provisions of the National Insurance Acts 1911 and 1913, so far as they affect the relation of master and servant, are duly noted here, whilst their effect generally is set forth in Volume III by Mr. J. G. Pease. Of the remaining portion of Volume II, dealing with Public Rights, the Editor has contributed the largest share in which the alteration effected by the Parliament Act 1911, the Provisional Collection of Taxes Act 1913, and the Extension of Polling Hours Act 1913 are explained. In

revising the chapter on the Privy Council, the Editor has enjoyed the invaluable assistance of Mr. J. C. Ledlie, B.C.L., of the Privy Council Office. In former editions only the legal aspects of the Council were depicted, with the result that the picture, though legally correct, was unrecognisable as a representation of a working institution. In the present edition a brief account is given of the relationship of the Cabinet to the Council, such as to present a more intelligible account of the working of the Executive. Of the remaining portion of Volume II, four chapters dealing with the Established Church are from the pen of Mr. P. V. Smith, whilst Chapter V on the Nonconformist Churches is entirely new. The largest additions to the law are contained in that portion of Volume III dealing with what is termed the Social Economy of the Law. Under this title the effects of some highly important Statutes are stated, *viz.*, the Labour Exchanges Act 1909, the Old Age Pension Act 1908, the Licensing (Consolidation) Act 1910, the National Insurance Acts 1911 and 1913, the Mental Deficiency Act 1913, the Children Act 1908, the Maritime Conventions Act 1911, and the Pilotage Act 1913. The bulk of this part is the work of Mr. J. G. Pease, whilst Mr. Macmorran contributes a chapter on Sanitary Law, Mr. A. B. Langridge on Navigation and Mercantile Marine, Dr. Hugh Fraser on the Press, and Mr. Welford on the Professions. The remainder of Volume III, dealing with Civil Injuries, is shared by Mr. A. D. McNair, Mr. J. A. Strahan, Mr. Bompas, Master Hughes-Onslow, Mr. Langridge, and Mr. Ross. In this there is not much substantial change in the law: the principal alteration has been a complete re-arrangement of the subjects. Volume IV, on Crimes, with the exception of the concluding section from the pen of the Editor, is by Mr. J. B. V. Marchant. In this the more important decisions of the Court of Criminal Appeal are noted, and the recent statutory experiments made with a view to render the punishment of crime at once more effective and more humane has received attention, whilst the Consolidating Statutes such as the Perjury Act 1911 and the Forgery Act 1913 have not been overlooked. In view of the immense advance in legal history in recent years, Mr. Jenks would, in our opinion, have been better advised had he entirely re-written the concluding section on the origin and development of English Law. He professes to have given warning of Blackstone's historical inaccuracies, but beyond a few criticisms of his own there is scarcely any allusion to the result

of modern research. As he himself is peculiarly fitted for such a task, it is curious he should have failed to carry it out. That it constitutes a danger to the success of this standard work is evident from the opinion recently expressed by a leading American jurist, that to Blackstone's *Commentaries* must be attributed the lack of interest in legal history in both England and America. In the States these *Commentaries* have been withdrawn as a preliminary study of English law from the curriculum of students.

Analysis of the Law of Contracts and Torts for the Use of Students. By A. M. WILSHERE, M.A., LL.B., and D. ROBB, B.A. London: Sweet & Maxwell. 1914.—This is an analysis of those chapters of *The Common Law of England*, by Dr. Blake Odgers, K.C., which deals with the law of Contract and Tort. The analysis is in just the form in which a student attending lectures on these subjects ought to write up his notes after the conclusion of the lecture. This book will save him the trouble. For examination purposes it is excellent.

Criminal Offences in Bankruptcy. By H. D. ROOME. London: Butterworth & Co. 1914.—By the Bankruptcy and Deeds of Arrangement Act 1913 (3 & 4 Geo. V, c. 34) power is granted to prosecute certain bankruptcy offences summarily, thus throwing additional duties upon Courts of summary jurisdiction. To each section of the Act comments and criticisms are added, together with all decisions in support. This is quite a useful book.

Digest of Local Government Law. By A. D. DEAN and E. J. RIMMER. London: Butterworth & Co. 1914.—The Authors' aim has been to provide, on this complicated subject, a book which shall in every way be suitable for students, officials, and counsellors. It is thoughtfully prepared, and seems on all the ground which it covers to be accurate and trustworthy.

Handbook on the Bankruptcy and Deeds of Arrangement Act 1913. By OSCAR KUHN. London: Jordan & Sons. 1914.—This little book contains the Act of 1913 annotated, together with the Statutory Rules and Forms. The learned Author claims to show where the new Act amends and infringes upon the old law, and how the existing decisions on the old Acts may influence the interpretation of the law. This method is in no sense a new departure, but

what every author of a legal text-book endeavours to compass, and, indeed, just what practitioners demand.

The Money-Lender's Handbook. By G. H. C. MANNING. London: Jordan & Sons. 1914.—The Author of this manual is able to give money-lenders the benefit of his experience as an official in the office of the Controller of Stamps, Inland Revenue, which has taught him that the ordinary money-lender requires some simple and practical exposition of the law affecting him. Personally, we should not have expected to find even the ordinary money-lender so simple and without guile; but if such innocent and harmless persons really exist, this is just the simple book they will appreciate. The Author explains clearly and accurately what a money-lender must do in the matter of registration; formulates the factors which the Court will take into consideration in re-opening the transaction; and deals with those circumstances which will vitiate the contracts, and with the position of infants.

Mrs. Vanderstein's Jewels. By Mrs. CHARLES BRYCE. London: John Lane. 1914.—Detective stories do not often come our way, but we read this one with great interest. The mystery is well-concealed and great ingenuity is shown in working out the details. Suspicion shifts in the proper manner from character to character, and we do not think the most experienced reader of this class of fiction will be prepared for the *denouement.* We anticipated finding some of the usual errors in describing legal procedure, but the Authoress has avoided the possibility of this by leaving out all reference to legal proceedings. We might point out one or two improbabilities, but could not do so without telling too much of the story. The only serious defect we have to point out is, that the introductory part of the story is too long and drawn out. We think that in all stories of this sort the mystery, murder, disappearance, or whatever it may be, should appear very early in the plot. The detective is an interesting and original character, and we shall be glad to meet with him again.

Second Edition. *Manual of the Law of Evidence.* By S. L. PHIPSON, M.A. London: Stevens and Haynes. 1914.—This abridgment of the learned Author's well-known *Law of Evidence*

which has become one of the standard text-books on this branch of the law, is intended for the use of students only. In the arrangement of topics, the fifth edition of the larger work has been followed, with references to the corresponding subjects dealt with in that work. An extremely useful preliminary outline has been added, and the cases brought down to April of this year.

Third Edition. *Contracts in Restraint of Trade.* By W. ARNOLD JOLLY, M.A. London: Butterworth & Co. 1914.—The last edition of this eminently useful little treatise on a small branch of the law of contract appeared in 1909, and since the tendency for this subject to increase in importance, especially in the case of service agreements, such a work as this is especially welcome. An instance of this class of agreement is that of *Mason* v. *Provident Clothing and Supply Company* (L. R. [1913], A. C. 724). Then, again, powerful trusts and associations of manufacturers on the American model are growing up in almost every industry and distribution of commodities. The cases of *Attorney-General for Australia* v. *Adelaide Steamship Company* (L. R. [1913], A. C. 781) decided by the Privy Council, and *Russell* v. *Amalgamated Society of Carpenters* (L. R. [1912], A. C. 421), decided in the House of Lords, show the immense importance to public interests as well as to individuals of the doctrine of restraint of trade with reference to combinations of this character. Mr. Jolly has spared no pains in making his book complete, and in dealing with all the reported decisions.

Eighth Edition. *Laurance's Deeds of Arrangement.* By S. E. WILLIAMS. London: Stevens & Sons. 1914.—We only noticed the seventh edition of this book in the last number of this Magazine when we noted that with the passing of the Bankruptcy and Deeds of Arrangement Act 1913, fresh difficulties appeared to have arisen. Some of these difficulties the learned Author of the present edition states still remain, although many have been removed by the recent issue of the Rules of 1914. The publication of these Rules has necessitated many alterations in the text of the former edition. These have been made in the present edition, to which the new Rules have been added.

Fourteenth Edition. *Gibson's Student's Guide to Stephen's Commentaries, Sixteenth Edition.* By H. G. RIVINGTON, M.A., and A. C. FOUNTAINE. London: *Law Notes* Publishing Offices. 1914.

This book is intended for the use of students preparing for the intermediate Examination for Solicitors, in which the set text-book is *Stephen's Commentaries.* For examination purposes the plan of this book could scarcely be bettered. Each chapter is epitomised and the chief points noted. In addition are tables, a great aid to memorising. *Stephen's Commentaries,* as we remember it thirty years ago, was not an easy book for a beginner to tackle. The present edition is, of course, immensely superior, but even so the young student will be wise if he avails himself of the help rendered by this Guide. The present edition has been brought well up to date, and many new points have been added to meet the alterations made in the new edition of the *Commentaries.*

CONTEMPORARY LAW REVIEWS.

It is impossible to read our exchanges and other legal reviews which come to hand without noticing the universal stir among the dry bones of the codified systems of civil and penal legislation. We all recognise our great debt to the omnipotent Roman law, the principles of which survived the greatest changes in the history of nations and in their internal developments. These principles formed the backbone of most of the modern civil codes, which stereotyped society on its legal side, and by their apparent immutability hindered the healthy growth of the human object whose life it regulated, and at the same time tramelled.

The *Revista General de Legislación y Jurisprudencia* (Madrid) for the year 1913, contains plentiful evidence for the modern spirit which is beginning to agitate even the lifeless skeleton of the Codes. This modern spirit is, in fact, the realisation that man is not merely a thing, but a living being, and one of many other similar beings. This growing realisation is what constitutes the humanitarian and social movements of our time, and little by little it is making its mark on law. Perhaps the article which best shows what is meant is the one on "New aims of the Civil Law in Italy," by Miguel de Angulo Riamon, subject, of course, to the recollection that what is happening in Italy is happening also in Spain and the rest of the civilised world. The review which we are considering, of course,

contains many articles of local interest directed, *e.g.*, to reforms of procedure, &c., but what is most striking in the Review and in its exchanges are such articles as "The Civil Emancipation of Married Women," by Luis Rigaud, translated by Carlos G. Posada; several discussions on what is known as *La recherche de la paternité*, which has become a very living matter since the French law of 1912; the White Slave Trade, legally considered, by José Santaló; and the *Ne Temere* decree, by José M. Campos y Pulido. A note by Señor Azcarate draws attention to the way in which practice has left halting law behind in recognising the validity of certain contracts by minors, which strictly require the authorisation of parents or guardians. Nothing, however, is more noticeable than the attention which is being paid to criminology and the proper function of the law in reforming and deterring criminals, articles on different branches of this subject being contributed by Frederico Castejón, Pedro Dorado, and Quintiliano Saldaña. There is an old idea abroad that Spanish prisons are among the worst and the prisoners the most abandoned. However, things move even in Spain, and while much is *muy atrasado*, she possesses some prisons equal to the best, and as well administered. An important Congress on prisons is to be held in Coruña at the beginning of August.

Books received, reviews of which have been held over owing to want of space.—*Burge's Colonial Law, Vol. IV*; Dicey's *Law and Opinion in England*; Bowstead's *Forms and Precedents*; Wilshere's *Analysis of Williams' Real and Personal Property*; Bellot's *The Temple*; *Bentham's Theory of Legislation*; Stone's *Insurance Cases*; Moller and Wolff's *Handbook of Legal Proceedings Abroad*; Davey's *Law relating to the Mentally Defective*; *Seaborne's Vendors and Purchasers*; Strahan's *Law of Partnership*; Vinogradoff's *Oxford Studies in Social and Legal History*; *Alpe's Law of Stamp Duties*; Hudson's *Building &c. Contracts*; Seoharvis' *Die Quellen des Islamitischen Rechts*; Bennett's *Chancery of Lancashire Practice*: Spaight's *Aircraft in War*: *The New Guide to the Bar*; Bennett's *History of the Bill of Lading*; Neumeyer and Strupp's *Jahrbuch des Völlerrechts, Vol. II*: Smith's *Principles of Equity*; *Encyclopædia of the Laws of England, Vol. 16.*

Other Publications received:—Graham, *Method of Calculating the Rate of Interest charged by Moneylenders* (Stevens & Sons): Randolph's *Opinion on the Anti-Trust Act*; Vaughan, *The Lawyer's London Temple*; Eloy, *Les Droits du Critique Littéraire et Dramatique*; *The Indian Law Quarterly, Part I*: Guterbock's *Studien und Skizzen zum Englischen Strafprozess des Dreizehnten Jahrhunderts*; McMurdy, *The Enforcement of Law*; Riddell, *The Administration of Justice.*

THE

LAW MAGAZINE AND REVIEW.

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I.—CHURCH AND STATE.

THE passing of the Welsh Church Bill under the Parliament Act, subject, however, to its suspension till after the present international crisis is over, may be a suitable opportunity to direct attention to certain aspects of the relation between the Church of England and the State which have been suggested by two very different publications: the one a compendium of the laws against Nonconformity which have stood upon the Statute Book of England,[1] and the other the Blue Book of the First Report from the Select Committee of the House of Lords on matters affecting the Church in Wales,[2] which was appointed to inquire and report *inter alia* whether the constitution of the Convocations of the Church of England has ever been altered by Act of Parliament without the assent and against the protest of Convocation. The former does not profess to be more than a summary of the statutes passed, in order to secure conformity with the established religion, and those subsequently enacted by way of relaxing the fetters of uniformity: and the net result is to leave a mental impression similar to that which would be created

[1] *The Laws against Nonconformity.* By T. Bennett, LL.D. Grimsby: Roberts & Jackson. 1913.

[2] Par. Paper, 1914, No. 238.

by a like collection of the laws which have at various times constituted capital felonies. It is, at most, a record in a convenient form of the repeated attempts of the Legislature in former times to impose a uniform pattern on the whole religious life of the Kingdom. This was bound to yield to the claim bound up as it is with the progress of enlightenment and civilisation—of liberty of conscience, and the rejection of any religious test in relation to civic life. That the Church of England was thereby placed in a privileged position in relation to other religious denominations is of course undeniable; and it is true that certain of its privileges remain. Thus, the reigning Sovereign must be a member of it: it is represented in the House of Lords, and the Archbishop of Canterbury is the premier subject of the realm after the Royal Family; it has a special position as regards marriages and burials, owing to its possession of parish churches and churchyards; and the divinity degrees and professorships of some of the older Universities are still confined to its members. But there are counteracting disadvantages, *e.g.*, the exclusion of Anglican priests and ministers from political life—a disability to which Roman Catholics are also subject—while the Nonconformists are exempt from it.

Jews and Roman Catholics are debarred from the high offices of the Regent of the Kingdom, the Lord Chancellor, the Lord Lieutenant of Ireland, and the High Commissioner to the Assembly of the Established Church of Scotland. Such ancillary rights of Church authorities as the exercise of individual patronage of benefices, north and south of the river Trent, belonging to Roman Catholics, by the Universities of Oxford and Cambridge respectively, and the exercise of such patronage belonging to Roman Catholics by virtue of any office by the Archbishop of Canterbury, are only part of their administrative working.

These privileges of the Church can hardly be described as going beyond what is incidental to its official connection with the State; nor can Nonconformists reasonably object to such requirements of the law (obviously on the ground of public policy) as the registration of places of worship of Nonconformists, in order to obtain exemption from local burdens and from the jurisdiction over charitable trusts, and in order that marriages may be performed in such buildings, and also in order to obtain exemption, for their ministers, from service, as churchwardens or jurymen, on making declarations before a justice. For all practical purposes, Protestant Nonconformity stands on a footing of complete equality with the Church of England; and the greater bodies, such as the Wesleyan, Independent or Congregational, and Baptist denominations, enjoy the express privilege of direct access to the Sovereign.

It is not gathered that the author of this work desires to convey that the advantages of the Church above mentioned constitute continuing grievances of religious inequality; but the bare enumeration of the various restrictions imposed by statute from time to time on Nonconformists, may leave an impression that the Church called in the help of the State to uphold its monopoly of the nation's religious life, even by depriving members of other bodies of the full rights of citizenship, and that it has continuously opposed the claims of the other religious bodies to full recognition of their spiritual position during a struggle of more than two centuries. The facts are really the other way. It was the civil government which, as a matter of policy, made adherence to the official Church compulsory. The endeavour after religious uniformity was the result of the State's direct interference with the spiritual province of the Church, and no less in the time of Parliamentary and Cromwellian supremacy than under the Monarchy did the Legislature strive to curb the licence of free individual religious thought.

In the Tudor and Stuart reigns the connection between Church and State was considered as constitutionally essential; and in the 18th century similar theories of political government postulated the two working in combination. Protestant Dissenters, however, secured exemption from the penalties of Nonconformity by the Toleration Act (1689): and by the end of the next century they had begun to assert their right to religious equality with the Church, which had perhaps allowed its State connection to numb its energies. Their example was followed at the beginning of the 19th century by the Roman Catholics (the chief Acts were those of 1802 and 1829) demanding emancipation from the fetters of civic incapacity which they had borne since the Reformation. The reasons for the greater restrictions placed on them were no doubt that it was desired to make a clean break between the former ecclesiastical *régime* and the new one set up under the supervision and direction of the civil authority, and that the Papal claim to temporal sovereignty as well as ecclesiastical supremacy was treated as a serious challenge to the civil power, which was to be opposed in the clearest terms of protest. Jews did not obtain full civic rights till well on in the 19th century. It is worth while to consider briefly, not only in view of its record in the past, but also in view of the possibility of the Established Church losing its connection with the State, as is proposed for the dioceses in Wales, what was the effect of the statutory "Establishment" of the Church as regards its doctrine, judicial organisation, and juridical position, and whether the Church derives any advantage in these respects over other religious bodies.

The starting point of the new order of things was the statutory enunciation of the doctrine of the Royal supremacy. After being stated in an extreme form by the Acts of Henry VIII, it was declared in a modified form by Elizabeth (by admonition in the Royal Injunctions of 1559) to be that

the Queen did not challenge any authority other than was challenged and used by the Kings, her father and brother, which is and was of ancient time due to the Imperial Crown of this realm, *i.e.*, that "the Queen should have sovereignty and rule over all manner of persons of what estate, ecclesiastical or temporal, so as no other foreign Power should have any authority over them." It was asserted (1) in the manner of election of Bishops by legislation of Henry VIII, *viz.*, the old procedure was followed except that the papal jurisdiction was taken away, (2) in appeals in ecclesiastical matters.

In theory this was not a departure from the former order of things. The supremacy of the Crown over all persons and in all cases, ecclesiastical and civil, was well recognised in the Common law before the Tudor legislation which expressly gave it statutory force, and it was shown by the power of the King's Courts to prohibit the ecclesiastical Courts if coming into conflict with the ordinary law, and also in the fact that, by the Constitutions of Clarendon (1164), appeals in ecclesiastical causes went finally to the King. Subsequently such appeals were by custom referred to the Pope, but it was recognised that the King's authority was not to be prejudiced thereby. The supremacy of the Crown was also recognised in its right to nominate to bishoprics even when granting its licence for a free election to fill the vacancy, and the election was subject to the King's consent, which was necessary for the investiture of the elected person with the temporalities. The Statute of Provisors rejected the claim of the Pope to collate to bishoprics, and in 1392 a preamble to a statute recites an objection by the Commons to actions by the Pope which were contrary to the Common law, such as the translation of English bishops to foreign sees and to other English sees. But in practice this arrogation of supreme ecclesiastical power constituted a definite departure from the

former position of co-existing authorities and jurisdictions of the State and Church respectively, for the civil power, instead of lending its aid to enforce the ecclesiastical power as before, now took up the active part and treated ecclesiastical offences as civil offences. The State now had to supervise the doctrines and settle the policy of the Church. It made it its business on the one hand to retain, so far as possible, the truly Catholic doctrines, and on the other hand to make the necessary concessions to the spirit of the Reformation, which was rising so rapidly on the Continent: and it found itself obliged to prescribe by statute the doctrines and form of worship of the Church. Previously statutory uniformity in religion was novel to English law. Though, in Hooker's words, "there is not any man a member of the Commonwealth who is not also of the Church of England," previously to Tudor times these matters were left to the Church, and only on special occasions did the civil power intervene with regard to spiritual matters in aid of the ecclesiastical jurisdiction. A proof of this change is to be found in the fact that the term "Nonconformist" is not found before the Elizabethan Act of Uniformity. Before that time divergence from the teaching and ritual of the Church had been dealt with as heresy, to be mentioned subsequently. It is the opinion of writers[1] that actual Nonconformity with the Church did not exist, at least for practical purposes, before the reign of Elizabeth: those who differed from the Church probably conformed. The clergy with Papal sympathies, left their offices and benefices owing to the Elizabethan Act of Uniformity and Supremacy: and Protestant Dissenters were severely dealt with on several occasions during her reign, as also during those of James I and Charles II. At Common law, Nonconformity is not an offence, nor is it an ecclesiastical offence in a layman—thus he can be a church-

[1] *E.g.*, Winslow, and see article in *Encyclopædia of Laws of England.*

warden except in "new parishes" of the Church of England, he can claim baptism and marriage and burial from a minister of the Church, and he can present to a Church living. Another equivalent term in the Elizabethan, Jacobean and Carolean statutes of uniformity is "recusant" (generally coupled with "papist" or popish), which has been defined[1] as a "person, whether papist or other, who refuses to go to church and worship God after the manner of the Church of England"; and a "popish recusant convict" was a person legally convicted of such an offence. The general requirements of all the uniformity legislation were, that laymen were required to attend the parish church and conform to its formularies, and attendance at conventicles was a criminal offence; while in order to obtain uniformity as regards doctrines and beliefs, resort was had to the penalties of heresy which had already been applied by the Legislature in some isolated measures against particular innovations in church doctrines, such as the Lollards. In the reign of Richard II, power was given by Act to imprison heretics till they justified themselves according to reason and the law of Holy Church.[2]

Almost the earliest recorded case of capital punishment for heresy, is that of the *Deacon and Jewess* which has been especially examined by Professor Maitland,[3] a case (dated 1222) in which a deacon, after trial by a Provincial Council at Oxford, was sentenced to be burnt because he had apostatised to Judaism for the love of a Jewess. This seems to have been the only precedent for such a punishment until the Lollard cases in 1410. In this case the sentence of the Council was carried out by the King's bailiffs, apparently without any trial or sentence by the King's Court. Maitland's view, based on the other evidence extant as to cases of this kind, is that this was not considered as a legal

[1] Burn's *Ecclesiastical Law* (1842), iii. 142.
[2] 5 Rich. II, CC. 2—5 [1382].
[3] L. Q. R., II, 153

precedent, but was referable to the generally accepted view at that time that the Church had exclusive jurisdiction as regards spiritual matters, and that this would be regarded as a case of discipline over a clerk, which was too heinous to make any reference to a Civil Court for sanction necessary. The contributions made by Bishop Stubbs, the historian, as historical appendices to the Report of the Ecclesiastical Commission of 1883,[1] gives the details of the records of these cases, but his conclusion, that it is certain that by the Common law burning was the penalty for heresy, is not borne out by the lawyers who have expressed opinions on this point. It is significant in this connection that, as already pointed out, Professor Maitland, whose theory that the Canon law of the Church was fully accepted and was in full force until the English Reformation, is well known, expresses himself very cautiously as to the legal effect of the *Deacon and Jewess Case*.

The Act *de heretico comburendo*[2] made heresy (*e.g.*, that charged against the Lollards, was "writing books contrary to the Catholic faith or determinations of the Holy Church, or of such sect and wicked doctrines and opinions making any conventicles or holding or exercising schools)" punishable by burning. The repeal of this statute in 1559 was, however, thought not sufficient to take away the liability of heretics to be burnt at Common law. Such burnings took place in the reign of James I, though the opinions of the judges of that time can hardly be considered as firm constitutional precedents in view of their want of independence of the Crown. Another Act was accordingly passed for that purpose in 1677, 29 Car. II, 9, forbidding atheism, blasphemy, heresy or schism to be punished by death by any Court, but reserving the rights of archbishops, bishops, and ecclesiastical persons to punish heresy by excommunication, deprivation, degradation, and other ecclesiastical censures. The Act

[1] Vol. II, 52, &c. [2] 2 Hen. IV, c. 15 [1401].

2 Hen. IV, 15, was followed by the similar 2 Hen. V, 7 (1414). The Constitutions of Archbishop Arundel (1409) and of Archbishop Chichele (1416), provided a procedure for heresy causes before bishops or Consistory Courts, and heresy itself was defined by the former authority. There were five trials of heresy between 1410 and 1457 before the archbishop with episcopal assessors, and two before him sitting with non-episcopal assessors. Heresy was in the Middle Ages punished by the Church Courts, but the only penalties they could inflict were ecclesiastical censures, imposition of penances, excommunications, and in case of clerics, deprivation of benefices. The Civil law of the Roman Empire had provided that it should be punishable by death by burning at the hands of the State for obstinate and relapsed heretics, and the English Canonists urged that this should be treated as part of the Common law. The writ *de heretico comburendo* was actually put in force between 1410 and 1612, but it is a moot point whether the offence was punishable by death and whether the writ was of any real force. It is not clear if conviction of such an offence before the ordinary warranted the exercise of the writ, or whether the conviction had to be made before Convocation. The burnings for heresy inflicted upon the Lollards and by the Tudor sovereigns, were mostly under statutory authority. The heresy statutes were all repealed by the 1 Edw. VI, 12, and 1 Eliz. 1 (they had been re-enacted in the interval by Philip and Mary); and the latter statute gave a definition of heresy. Previously, the lay courts had accepted the findings of the Ecclesiastical Courts, but had the power to determine if a particular tenet was heretical or not. It was defined to be "what had been so determined, ordered or adjudged by the authority of the canonical scriptures, the first four General Councils, or any other General Council wherein the same was declared heresy by authority of canonical scriptures, in express or plain words,

of such as the High Court of Parliament should declare with the assent of the clergy in Convocation." Though repealed by the Statute Law Revision Act 1863, the Courts have always followed the definition. It is perhaps still possible for a layman to be prosecuted for heresy in an Ecclesiastical Court, and excommunicated if he refuses to recant, upon which the Court can order six months' imprisonment.

As regards the judicial organisation of the Church, the existing Bishops' Courts continued after the Reformation; but the civil power claimed jurisdiction over cases of doctrine. The jurisdiction of the civil power to deal with heresy was based by the Tudor sovereigns upon their power by virtue of the Royal Supremacy, as regards the Church, to reform and reduce all errors, heresies, abuses, offences, contempts and enormities which by any spiritual authority may lawfully be reformed, etc., notwithstanding any usage, custom, foreign laws, foreign authority, prescription, or any other thing to the contrary in the Church.[1] Heresy was triable before the Ecclesiastical Courts, and under Edward VI, though the heresy statutes were repealed, trials for heresy took place before the archbishop and others as commissaries of the King according to the procedure of the Ecclesiastical Courts. Two special Courts designed for appeals and important causes, the High Court of Delegates and the High Commission, were set up by Henry VIII, and Elizabeth respectively, both to exercise the ecclesiastical jurisdiction vested in the Crown. The latter Court was abolished by the Long Parliament,[2] and the powers of the former were transferred to the Judicial Committee of the Privy Council in 1830. A considerable part of the present jurisdiction of the Ecclesiastical Courts is permissive in character, faculties and the like, and is chiefly concerned with the fabrics and fittings of churches and churchyards.

[1] 26 Hen. VIII, 1, and 1 Eliz., 1.

[2] 16 Car. I, 11.

for the addition to or modification of which a faculty from the diocesan chancellor is necessary. Cases involving points of doctrine come ultimately under the cognizance of the secular Court, the Judicial Committee of the Privy Council, but these have become very rare. In the well-known modern case of the Bishop of Lincoln, which was concerned with questions of ritual and doctrine, the Archbishop of Canterbury held a Special Court, with his Vicar-General, and the Bishops of London, Hereford, Rochester and Salisbury as assessors. An appeal was taken to the Privy Council, which had held that the archbishop had such jurisdiction with or without assessors, and an appeal so lay from his decision, but the respondent bishop did not appear. There are also special statutory provisions for maintaining ecclesiastical discipline in the Church under the Acts of 1840, 1892 and 1898. But these Courts cannot impose penalties other than deprivation or suspension from office, and the ecclesiastical jurisdiction requires the aid of the civil arm to give its decisions effect, *e.g.*, in order to recover tithes resort must be had to the civil Courts, though the property of ecclesiastical persons can only be made available in execution with the sanction of the ecclesiastical authorities. Nevertheless the Church has a *forum domesticum*; and except in the case of ecclesiastical matters which have a civil aspect, and of trusts in legal instruments, the civil Courts do not exercise jurisdiction. In the case of other religious bodies resort must be had to the civil Courts, *e.g.*, to determine the status of Nonconformist ministers.

The juridical position of the Church as a historic organisation has the further advantage of rendering it independent of the civil Courts as regards its status, doctrines and organisation. It can take property left or given or placed in trust with it without having to show what its doctrines are or what its general purposes embrace. The fact of its having a law of its own, equally valid as law with the ordinary law

of the land, distinguishes it broadly from the non-official religious bodies. They must resort to the civil Courts to determine all questions of organisation and discipline, as well as of doctrine and ritual, which depend ultimately on the legal instruments by which those matters are regulated, viz., the trust deeds of the different denominations which govern, except where the aid of Parliament has been invoked.

There is no power except in Parliament to alter the mutual relations of members of those Churches as fixed by their trust deeds. Where these do not expressly state the doctrines which are those of the particular society or congregation, by statute a twenty-five years' usage is allowed to be conclusive of their character, yet the majority have no rights over the minority except as the original titles may prescribe. Much progress has been made towards consolidation of the individual bodies of particular religious communities: there have been Parliamentary unions of two or three of these bodies: and much is being done by special local associations of a particular denomination in a particular county or district to bring independent units belonging to the same general persuasion under a centralised authority, and by the general adoption of "model deeds" of the larger denominations for the property of independent congregations. The voluntary churches and the Established Church have therefore each their relative advantages and disadvantages. The constitution of the former must be expressed in legal instruments and be subject to legal interpretation. The State Church is subject to restrictions on her freedom of action in consideration of the benefit accruing to her from her official connection: her formularies are fixed by Act of Parliament, and her deliberative assembly cannot meet without the sanction of the Crown. For these the only *quid pro quo* is her privileged position. But the proposed disestablishment and disendowment of the Church in Wales

raises the converse question what is to be the attitude of the State towards a church or a portion of a church which for political reasons is considered to be no longer entitled to be regarded as the "established" or official religious denomination because not that of the numerical majority of the population. The inquiry of the House of Lords Committee raises in its most acute form the question of how far the Legislature can interfere with the organisation of any religious body after it has lost its connection with the State; and the evidence of such ecclesiastical experts as the present Dean of the Arches (Sir L. Dibdin), the Archbishop of Canterbury, and the Bishop of St. Davids, on the constitutional and legal aspect of the proposal to deprive the Church in Wales of its representation in Convocation, is of the most weighty kind. Its importance may perhaps justify the following summary of the evidence and arguments presented as regards the relation of the Church in Wales to the whole body of the Church of England and the position of Convocation.

The dioceses of the Church in Wales have for practical purposes always (*i.e.*, since the beginning of the 13th century without dispute) been part of the Province of Canterbury. Until the submission of the clergy to Henry VIII, Convocation, consisting of the bishops (and abbots till they were suppressed), deans, archdeacons and proctors for the parochial clergy, could be and was summoned to meet by the archbishop independently of the Crown, but when a subsidy was demanded by the Crown from the clergy it was done by a King's writ to the archbishop commanding him to summon it: and the recital in the Act of Parliament of 1534 that the clergy have "acknowledged according to the truth that the Convocation of the Clergy is, always has been, and ought to be assembled only by the King's writ"—perhaps due to an inaccurate rendering by the draftsman of the words actually used in

the Submission "which Convocation is, always has been, and must be assembled only by Your Highness's commandment of writ" (i.e. King Henry VIII personally), is demonstrably inconsistent with the actual facts.

Parliament always fully recognised Convocation as a co-ordinate body with itself, and in fact in 1702 the Commons passed a resolution that it would on all occasions uphold the just rights and privileges of the Lower House of Convocation. Parliament has never interfered with the constitution of Convocation, although as a result of legislation its personal composition has been affected, e.g., by the elimination of the abbots and priors, and in one case by the statutory transfer of one bishopric (Sodor and Man) from the Province of Canterbury to that of York. Convocation is the Provincial Synod of Canterbury—to which Wales, in the Upper House, contributes four out of twenty-seven bishops, and in the Lower House, about one-seventh of the whole body—and not a political or civil assembly for the purpose of taxing the clergy. By the Submission of the clergy, the King's writ to the archbishop to summon Convocation was to issue in all cases, and not only—as theretofore—in cases of subsidy: no canon was to pass without the King's licence: and a canon, when passed, was not to be effectual until approved by the King after it had been passed. The Crown has, by issuing "letters of business" on rare occasions (three times in the last forty years) directed the discussion of certain subjects by Convocation in order to obtain its advice upon them, but this was not essential to their discussion, nor does it limit discussion to those subjects, and in practice, it is preliminary only to the making of a canon. Parliament has legislated on subjects concerning the Church directly, such as in the Public Worship Regulation Act 1874 and the Burials Act 1880, and indirectly such as in the Divorce Act 1857, and the Marriage with a Deceased Wife's Sister Act 1907, without consulting

Convocation, or against its protests. It is also to be remembered that Convocation was not summoned from 1717 to 1850.

The Welsh Church Act in its present form does not appear to state very clearly what position the disestablished Church in Wales is to hold. In many respects it is similar to the Irish Church Act 1869. Briefly, it provides that the Church of England, so far as it extends to or exists in Wales and Monmouthshire (called the Church in Wales) ceases to be established by law. All rights of patronage determine: all ecclesiastical corporations in the Church in Wales are dissolved: and no bishop of the Church may be summoned or is qualified to sit or vote as a Lord of Parliament. Ecclesiastical Courts and persons in Wales and Monmouthshire cease to exercise jurisdiction, and the ecclesiastical law of the Church in Wales, as well as the law relating to marriages in churches of the Church of England, ceases to exist as law. The existing ecclesiastical law and articles, doctrines, rites, rules, discipline and ordinances of the Church, subject to modification or alteration made according to the constitution and regulations for the time being of the Church in Wales, are to be binding on the members of it for the time being in the same manner as if they had mutually agreed to be so bound, and shall be capable of being enforced in the temporal Courts in relation to any property held on behalf of the Church or any members of it under this Act as if assured upon trusts to that effect. The constitution and regulations of that Church may, however, provide for the establishment of Ecclesiastical Courts for the Church, and, if the Archbishop of Canterbury consents (which is subject to the approval of the King in Council) for appeals to go from those courts to his Provincial Court; but the Courts have no coercive jurisdiction, and no appeal lies from them to the King in Council. From the date of disestablishment,

the bishops and clergy of the Church in Wales cease to be members of or to be represented in the Houses of Convocation of the Province of Canterbury, but the Act does not affect the powers of those Houses so far as they relate to matters outside Wales and Monmouthshire. The Act also provides that the bishops, clergy and laity of the Church in Wales may hold synods and elect representatives thereto, or frame, either by themselves or by their representatives elected as they think fit, constitutions and regulations for the general management and good government of the Church in Wales, and its property and affairs, whether as a whole or according to dioceses, and the future representation of members thereof in a general synod or in diocesan synods or otherwise; and the King in Council, if satisfied that the Bishops, clergy and laity have appointed any person to represent them and hold property for any of their uses and purposes, may by charter incorporate those persons (called the representative body) with power to hold land without licence in mortmain: and the property, buildings, plate, furniture, and other moveable chattels belonging to churches, etc., of the Church is to be transferred to them.

The Act does not in express terms cut the dioceses out of the Province of Canterbury, and the view of the Government has been stated to be that the Welsh Church representatives can still attend Convocation, except when it is meeting to discuss letters of business. By reason of what has been already said, this seems to be based on a misconception as to the effect of letters of business. At any rate, the connection of these dioceses with the judicial organisation of the Province is disturbed as already seen, and the facultative appeal from the Welsh Church Courts to the Provincial Court depends on the approval of the Crown in Council, *i.e.*, the Government in power. The disestablishment of a territorial section of a church must

inevitably modify the organism of the general body to which it belongs, the remainder of which still continues its connection with the State; and there is therefore ground for the objection urged by the Bishop of St. Davids to the Committee that the Act intentionally dismembers the present Province of Canterbury, and through it, the whole Church of England. In his view, this latter intention is borne out by a comparison of the present Act with the Bills of 1895 and 1909, which shows that while all three abolish ecclesiastical law in Wales as law, and substitute for it the existing Church law, upon the basis of an implied contract until the Church should itself alter them, the present Act omits their provisions which reserve the present jurisdiction and authority of the Archbishop of Canterbury and his Courts, and declare that any change made by the Church in Wales after disestablishment in its constitution and regulations should not be binding or enforceable against the Archbishop of Canterbury without his consent. He cited as further evidence of this the provision that the Church property, which is to continue such, is only to be transferred to the new representative body, and therefore, unless such a body is organised (which requires the approval of the State), the Church would forfeit the remaining endowments, buildings, churches and parsonages, except the plate, furniture, and other moveable chattels of its churches. A similar provision to transfer to the representative body is, however, to be found in the Irish Church Act, but there the whole ecclesiastical body was being dealt with. But, perhaps the strongest point taken by the Bishop against the exclusion of the Welsh dioceses from the Synod (and perhaps the Province) of Canterbury is, that this violates the religious liberty of those dioceses when disestablished, for if disestablishment has its ordinary meaning it means the liberation of the Church from State control; but it is

meaningless if the State claims the same right to interfere with the Church's religious organisation when it has been disestablished, as it might have claimed if the Church had not been disestablished. The organisation of the Church in Wales, after disestablishment, is a question for churchmen only; and dismemberment of the Church, or the exclusion of the Welsh bishops and clergy, is not essential to disestablishment. Nor is it a relevant answer to the charge that dismemberment of the Church is unconstitutional, that the Church can still have spiritual unity with the churches of the Anglican Communion in Ireland, Scotland, the British Oversea Dominions, and the United States, for there is no right in the State to destroy the unity of the Church of England.

If this provision of the Act means that the Welsh Church, when disestablished, is not to be allowed to organise itself except subject to the Home Secretary's discretion, and will not be allowed to continue its connection with the Church and the Province to which it has immemorially belonged, it goes beyond what is necessary for disestablishment, and is differentiating between the Church and the voluntary churches. The policy underlying this seems to be that the principle of nationality is to be extended into the sphere of religion, and Welsh Anglicans are to be obliged to form a separate body from the general Anglican Church with a constitution requiring the approval of the Minister of State. It does not seem more reasonable to enforce a separate local organisation of Church people in Wales than it would be to require the Roman Catholics, or Jews, or Nonconformists of Wales, to form distinct bodies from their general communions. At a time when Nonconformists are endeavouring to promote unity among their different denominations (*e.g.*, the United Methodists) by Parliamentary action, it is hardly reasonable for them to claim that Parliament has a right to separate a territorial section from the general body of

the Church against the will of both. It is a difficulty inherent in dealing with a portion of a religious body as if it were a national unit, and proposing to "disestablish" only a section of a national Church, that the whole ecclesiastical unit becomes in part disestablished and in part established; and the effect of this on the powers of the general consultative body of the whole Church, so divided, is at least to render these of doubtful validity. The Dean of Durham (Dr. Henson) pointed out to the Committee, that even if Convocation were left untouched and the Welsh members of it were free to take part as before in its discussions, that you then have a body in which the Welsh members may discuss and vote on many questions which only affect the English members, because they affect the relations of the clergy and church to the law of the land, and do not affect the private and voluntary discipline of the Welsh Church; though he admitted he did not see anything to prevent the Welsh dioceses being formed constitutionally into a new Province. But these do not constitute sufficient reasons for the State dictating to a religious body which it has freed from State control and deposed from State pre-eminence, what its organisation is to be, or for depriving the Welsh portion of the Anglican Church of its right to be represented in the general consultative body. If this portion is taken out of the Province to which ecclesiastically it has always belonged, this constitutes an interference with its members and their organisation after the only reason for the State's right of interference has been removed. *A fortiori*, if it is not taken out the injustice is greater. The logical position of a disestablished Church must surely be that it should be free from State control and its voluntary organisation should be left to its free choice, and the State's right of control should be limited to the State's depriving it of its official character.

There seems to be, therefore, good reason for taking out of the Act the provisions which dismember the Welsh area portion of the Church from the whole body, and limiting disestablishment to mere severance from the State connection, which can be secured by abolishing State patronage of bishoprics and benefices, redeeming private patronage (as in the case of the Irish Church), and depriving the Welsh sees of their right of membership of the House of Lords (a right which in the eventual reconstitution of that House the Anglican Bishops will almost certainly not continue to enjoy exclusively of the other denominations), and making Church law and Courts and discipline matters of contractual sanction. It is important to remember that there is no precedent for the disestablishment of a territorial section of a national Church. The case of the Irish Church, which has been largely referred to as a direct precedent in this matter, is distinguished in many particulars. Ireland was ecclesiastically distinct from England: it had its own Convocation (though this had not met since 1714), and separate organisation; it was only united with the Anglican Church by Act of Parliament and otherwise remained separate.

By the Irish Church Act 1869, the Union created by Act of Parliament between the Churches of England and Ireland sixty-nine years before was dissolved, and the Church of Ireland ceased to be established by law. The archbishops, bishops, and other ecclesiastical persons were deprived of any coercive jurisdiction; the Ecclesiastical Courts were abolished, and the ecclesiastical law of Ireland, except as to matrimonial causes and matters, ceased to exist as law; all ecclesiastical corporations were dissolved, and no archbishop or bishop of the Church were to be summoned to or qualified to sit in the House of Lords as such. All laws prohibiting the holding of synods and conventions were repealed, and the bishops, clergy, and laity of the said Church were not to be prevented from meeting in general synod or

convention, and by such representation and elected as they should appoint, to frame constitutions and regulations for the general management and good government of the Church, its property and offices, and the future representation of its members in diocesan synods, general conventions, or otherwise. The existing ecclesiastical law as to articles, doctrines, rites, rules, discipline, and ordinances of the Church were to subsist by contract, and to be enforceable in the temporal Courts. Provision was made as to the disposal of the Church property, and power was given to set up an incorporated governing Church body for the purpose of holding property. The Church was thus left entire freedom as a voluntary religious body, and the relationship between it and its members was definitely put on the basis of a contract; and no breach was made in its continuity as a Church. It is difficult to conceive how a different course is possible in the case of the Welsh dioceses, and how any person except members of the Church in Wales can claim to have any say in the matter. It certainly does not seem to be possible for Nonconformists to claim that Church people are not to decide that their Church government is to continue as before. The same principle is applicable to other denominations, and the disestablished Church is entitled to the same measure of freedom as them.

Another analogy, cited in the proceedings before the House of Lords' Committee, for the proposed position of the Welsh Church, is the voluntary position of the Anglican Churches, which have become autonomous ecclesiastical organisations (Provinces), in the Dominions. But in these cases it has been the wish of the particular Church itself; and their ecclesiastical history and geographical considerations are entirely different from that of the relation of Wales to England. These churches confer at regular intervals with the Church of England and act on the same

ties, but they have no direct influence on its decisions, and for example, the Royal Supremacy element in the Church's doctrine has no counterpart with them as unofficial churches. Whether this tenet would be retained by the Church of England, if disestablished, may be doubted, but the legal definition of it given already (viz. the supremacy of the Sovereign over his subjects) contains nothing that any Church could not accept consistently with obedience to their own voluntary constitutions.

An additional reason for the further consideration of the whole question of the future relations between the State and the Church in Wales, is to be found in the evidence tendered to the House of Lords' Committee on the second head of their investigation, viz., whether an increasing Nonconformist opinion in Wales is not beginning to declare against the disendowment proposals of the Bill. There are signs of a growing consciousness that an attack on the position of any one religious body in the country, and any diversion of its revenue to secular purposes, may weaken the religious life of the country as a whole, and may constitute a possible precedent for the State interfering with the endowments of other religious bodies. The proposed action with regard to the Church in Wales, even if it is restricted to the mere withdrawal of the State's recognition and control of that portion of the Church of England, will inevitably disturb the historic continuity of the whole body; and the contractual basis of relationship between a Church and its members, which is intelligible and appropriate for bodies of comparatively modern origin, seems a little inadequate in the case of a Church which the civil power has guaranteed for eight hundred years, and whose laws and regulations are Catholic in the widest sense, *i.e.*, derived from the great collective body of Canon law or Church law. The new Welsh Anglican Church—if it has to organise itself in such a local form—will have to decide

for itself such questions as the tenure of livings or cures, the disciplinary powers of ecclesiastical superiors over inferiors, the doctrines it is to hold, and its future relations to its parent body. It would be contrary to the spirit of the Toleration Act, and to all accepted notions of perfect freedom of religion, for the State to attempt to impose any restrictions on the freedom of action of the Church after it has ceased to hold any official position; and the State will be well advised, in the light of history, to limit its action to "disestablishment" (if that is necessary) in the strict sense of the word, *i.e.*, deprivation of official control by and dependence on the State. In that case the Church in Wales will no doubt regard the action of the State as having no relation to its spiritual organisation and activities, and the ecclesiastical unity of the Church of England (embracing Wales) can be preserved intact.

G. G. PHILLIMORE.

II.—THE MACNAUGHTON CASE.

THE case of Daniel MacNaughton, who was tried in 1843 for the murder of Mr. Edward Drummond, whom he had mistaken for Sir Robert Peel, is an important one in our criminal annals. The prisoner was acquitted on the ground of insanity, to the great indignation of the outside public. Men were horrified and disgusted at the escape of one who appeared a cold-blooded murderer, and the public feeling was loudly voiced in the press and in Parliament. Sir Valentine Blake went the length of moving in the House of Commons for leave to bring in a Bill to abolish the plea of insanity in cases of murder, except where it could be proved that the person accused was publicly known and reputed to be a maniac. On the same night the matter

was discussed in the House of Lords, and it was agreed, on the suggestion of Lord Lyndhurst, that the judges should be called upon to declare the correct legal doctrine on the subject of insanity. Five questions were carefully framed for the consideration of the judges, and the answers given by them were regarded as an authoritative enunciation of the law as to insanity. Before touching upon the doctrine of insanity, as judicially defined, it may be well to say something of the crime of MacNaughton.

On the afternoon of the 20th of January, 1843, Mr. Drummond, the private secretary of Sir Robert Peel, who was then Prime Minister, was returning alone to Downing Street, after having just left Drummonds' Bank at Charing Cross. When he was in Whitehall, Daniel MacNaughton came close behind him and deliberately shot him in the back with a pistol. The assailant was immediately seized, and, after a desperate struggle, was overpowered and taken to the police station. As he went, he said, "He" (or "She"—the witness was uncertain which expression was used) "shall not break my peace of mind any longer." Mr. Drummond died on the 25th of January, after great suffering, according to some, but after little suffering, according to others. He bore a strong personal resemblance to Sir Robert Peel, and there is no doubt that MacNaughton intended to shoot, and for a time thought that he had shot, the Prime Minister. When examined at Bow Street, MacNaughton, who was a native of Glasgow, made the following statement:—

"The Tories in my native city have compelled me "to do this. They follow and persecute me wherever I "go, and have entirely destroyed my peace of mind. "They followed me into France, into Scotland, and "all over England: in fact, they follow me wherever "I go. I cannot get no rest for them night or day. "I cannot sleep at night in consequence of the course

"they pursue towards me. I believe they have driven
"me into a consumption. I am sure I shall never be
"the man I formerly was. I used to have good health
"and strength, but I have not now. They have ac-
"cused me of crimes of which I am not guilty; they
"do everything in their power to harass and persecute
"me; in fact, they wish to murder me. It can be
"proved by evidence. That's all I have to say."

The statement was a tissue of delusions. The Tories had never persecuted him, and had never accused him of any crimes or done anything to harass or annoy him in any way.

The past life of MacNaughton was closely scrutinised on behalf of the Crown. He was the natural son of a turner at Glasgow, and had come to London some months before. He had always been a man of rigorously temperate habits, and had appeared to those associated with him a person of caution, shrewdness, and thrift. Although under thirty years of age, he was in possession of about £750, which he had acquired, as he himself said, "by the most vigilant industry," in his occupation as a turner. He had attended lectures on anatomy in Glasgow, and the surgeon who lectured, and a lawyer who also attended with MacNaughton, declared that they had never seen anything in him to indicate a disordered mind. In spite, however, of the appearance of sanity, it was proved that, for some eighteen months previously to his offence, he had continually represented himself as labouring under a conviction that he was the victim of some such indefinite, mysterious, and incessant persecution as he spoke of in his statement to the magistrates at Bow Street. Ten witnesses from Glasgow were called by Mr. Cockburn, Q.C., the counsel for MacNaughton, to establish his belief that he was being persecuted, and, among them, Sir James Campbell,[1] Lord

[1] He was the father of the late Sir Henry Campbell Bannerman.

Provost of Glasgow, to whom, as a magistrate, MacNaughton had applied for protection.

When MacNaughton shot Mr. Drummond, he professed to believe that the Tories were persecuting him. When he first began to labour under his delusion, it was the Jesuits and the Catholic Priests, who, he said, were his persecutors. Afterwards, however, he declared that the Tories were his enemies, and it was because Sir Robert Peel was the Tory Prime Minister that MacNaughton wished to kill him. There was some evidence that pointed to mental trouble besides the delusion. One of his employees, who was called as a witness, said that, between 1835 and 1838, MacNaughton frequently complained of a pain in his head, and would go and bathe in the Clyde, which was near his premises, in order to get rid of it. Nine physicians and surgeons were called, who unanimously declared that the prisoner was insane and labouring under an irresponsible delusion. Lord Chief Justice Tindal, who, with Mr. Justice Williams and Mr. Justice Coleridge, tried the prisoner, then asked Sir William Follett, the Solicitor-General, who appeared for the Crown, if he had medical evidence to rebut that given for the prisoner. Sir William Follett said that he had not, and the Court then stopped the case, the jury finding the prisoner not guilty on the ground of insanity.

As has been already stated, great public indignation was excited by the verdict, which was condemned by many writers. Taylor, in his work on *Medical Jurisprudence*, said he was quite at a loss to understand why a plea of irresponsibility should have been admitted. There can be little doubt, however, that MacNaughton was not a sane man. Mr. Samuel Warren, in an article in *Blackwood's Magazine*, in which he discussed the *Macnaughton Case*, described an interview which he had with MacNaughton about seven years after the commission of the crime. He states that MacNaughton complained of always being ill

used, although he was of course treated with the utmost kindness. About four or five years after his crime he took it into his head to "hunger strike" (if one may use a modern phrase), and had to be fed by means of a stomach pump. He grew tired, however, of the process, and eventually resumed his ordinary conduct. The superintendent of the Bethlehem Hospital, who had carefully observed his case, expressed no doubt as to his complete insanity, and Warren himself says that his manner and talk denoted imbecility.

The *MacNaughton Case* marked an important stage in the development of the law relating to insanity. The legal view of insanity has gradually changed, just as the medical view has done. The horrible madhouse, depicted by Hogarth, has given place to the wholesome and well-equipped mental hospital of modern days, and the law, like science, has been similarly humanised. The old view of insanity, however, was long in disappearing. At the beginning of the nineteenth century, after Hadfield, who had been charged with firing at George the Third, was acquitted on the ground of insanity, Windham suggested that an offender, *even if insane*, should be subjected to some sort of punishment, for the sake of example! Even as late as 1811 Bellingham, who shot Mr. Spencer Perceval, the Prime Minister, and who was beyond all question insane, was tried and executed with inhuman haste. It is said that Bellingham, while standing on the scaffold within a few moments of his execution, held out his hand, as if to ascertain whether it were raining, and remarked to the chaplain in a calm and natural tone and manner, "I think we shall have rain to-day." The treatment of MacNaughton showed a marked advance upon the treatment of Bellingham.

The outcry against the acquittal of MacNaughton led, as has been already stated, to the House of Lords consulting the judges on the law as to insanity. Five questions were put to the judges, and were duly answered by them. The

questions and answers are somewhat lengthy, and, as they are so accessible in legal manuals, it is unnecessary to reproduce them. Stated shortly, they lay down that no act is a crime, if the person who does it is at the time when it is done prevented by any disease affecting his mind (A) from knowing the nature and quality of his act, or (B) from knowing that the act is wrong. But it is also laid down that an act may be a crime although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects just mentioned in reference to that act. In Archbold's *Criminal Pleading*[1] it is stated that the answers in the *MacNaughton Case* "have in the main been accepted as laying down the law of England as to the definition of insanity with reference to criminal responsibility." They have, however, since their enunciation, been the subject of much criticism by legal and medical writers, and would undoubtedly have given rise to substantial injustice but for considerable judicial manipulation. It is the latitudinarian spirit in which they have been interpreted which has made acceptance of them possible. Lord Blackburn, for example, said on one occasion that the rules in *MacNaughton's Case* notwithstanding, there were "exceptional cases," and thus secured an acquittal in a case where conviction would have been inhuman. The rules cannot now be regarded as a satisfactory guide as to the law of insanity. They are carefully examined, and their numerous shortcomings pointed out by Mr. Wood Renton in his work on Lunacy, and by Sir James Stephen in his *History of the Criminal Law.* Sir James Stephen[2] thought that the law ought to be stated thus:

"No act is a crime if the person who does it is at "the time when it is done prevented *either by defective* "*mental power or* by any disease affecting his mind,

[1] 24th edition, p. 14.
[2] *Digest of the Criminal Law*, Art. 28.

"(*a*) from knowing the nature and quality of his act; "or

"(*b*) from knowing that the act is wrong; or

"(*c*) *from controlling his own conduct, unless the absence "of the power of control has been produced by his "own default.*"

The addition made by Sir James Stephen to the law has been actually followed in some cases. In Queensland and in Cape Colony it has been accepted as part of the law. An authoritative re-statement of the law of insanity, as it has developed since *MacNaughton's Case*, would be a valuable addition to the Criminal law.

J. A. LOVAT FRASER.

III.—SELF-GOVERNMENT IN THE INNS OF COURT.

IT has hitherto been assumed that the present paternal rule of the Benchers of the four Inns of Court over the members of their respective Houses has existed from time immemorial, and any attempt in modern times to question their authority has been regarded almost as an impertinence. If the constitution of the earliest legal hospices was of a popular or democratic nature, no hint, it has been alleged, of democracy is to be found in the government of any of the Greater Houses of Court.[1]

So far, however, from this allegation being true, it is the exact reverse of the facts. Abundant evidence survives, proving beyond all reasonable doubt that originally the constitution of the Inns of Courts differed not at all from that of the Inns of Chancery, which remained almost to the last democratic in spirit and form.

[1] Fletcher: *Gray's Inn Pension Book.* p. xiii.

It is to the *Black Books* of Lincoln's Inn that one naturally turns first, since they are prior by nearly a century to the records of any of the other Societies. A close examination of the earlier volume of the *Black Books* reveals the fact that at first there is no trace of the Council which ultimately became the sole governing power in the Society, and which has hitherto been regarded as existing from the earliest moment of the formation of the Inn. At the commencement of the Records it is the Fellowship and not the Council, in which the governing power is seen to reside. The Governors three, four, five, or six, as the case may be, are merely the most eminent Ancients of the House, annually elected by the Fellowship, and responsible to the Fellowship for the government of the Society, and for proved negligence in such government liable to, and in mercy of, the Fellowship. In 1447, for instance, William Osborne, one of the Governors or Rulers, was threatened with the penalty of expulsion from the Society by the Fellowship, if he failed before a specified day to repay the sum of 40s., which by his negligence had been lost to the House.

Whether the Fellowship at this date always included all the members of the Society, that is, the students as well as those called to the Bar, may be doubted. In several instances it certainly did. In 1427, we are told that the mainprise—*manucaptio*—upon admission of persons to the Fellowship was taken before the Governors and the Pensioner "deputed and assigned by the said Society to make mainprise of this kind according to the form of an ordinance made to that effect by the *common assent* of the said Society." Again, in 1428, we read "it is ordained by the Society," and in 1431 it was 'accorded,' *i.e.*, agreed by "all the felawschip that ther should be iiij revels in the yeere and no mo." In these instances, clearly, Fellowship and Society are synonymous, and both include all the members

of the House, since all from the rawest student to the most ancient of the Ancients was a Fellow of the House.

We read, it is true, of ordinances promulgated by the Governors, but we also read of ordinances addressed to the Governors; and when a dispute arises between William Jenney, one of the Governors, and the rest of his colleagues, it is "remitted to the discretion of the Society."

At this early date the Treasurer had not assumed the superior position in the House which he now holds. Still, the office was regarded as highly important, and there is nothing to show that his appointment differed from that of any other officer of the House. In 1455, we find Thomas Humfrey, not appointed by the Benchers but elected by the Society, with the significant clause added to the record of his election, "that by the consideration of the whole Society" he was to account not to the Benchers but to "the Society."

The following year, Folbery, the Pensioner—the most ancient officer in the House—was examined in the presence of the Society touching 40s. which he had retained and which he ought to have paid in part payment of the rent of the Inn.

When Maningham was admitted to the Inn in 1460, he was admitted to "repasts" only "with the consent of the Society." In 1462 it was ordered by the Society that every Fellow should pay 4s. a year for his pension, and two years later "it was ordered by the advice of the whole Society that every Fellow should pay 16[sh] a term," and by the like authority "The Autumn Reader was to be elected in Easter Term; the Lent Reader in Michaelmas Term"; and thereupon William Huddersfield was "elected by the Society to read in Lent."

Finally, from a Statute passed in 1466, we see also at this period who constituted the Society. It purports to be passed "by the Governors of the said Society, in

general council, held in the Chapel of St. Richard in the said Inn, *according to the custom thereof*, all being summoned who are of the said Society, as well at the Bench *as at the Bar, called 'utter barristers,'* to communicate, understand, ordain, and do what should be good, useful and necessary for the Society and the Inn, by their common consent and sole and spontaneous wish and by their authority." It is clear, then, that the ultimate authority known as the "Society" was composed of the Governors, Benchers, and Utter Barristers. The term "Inn" may be used here to indicate either the buildings of the Society or the household staff or both.

If there is any distinction between "The Society" and "The whole Society," Inner Barristers or Students would be included in the latter term, and properly so included, since in a voluntary Society they were entitled to say to what extent they should contribute to the funds of the House.

Moreover, in the agreement between the landlord of the Inn and the Society, the parties were the Bishop of the one part and two Governors and Richard Whiteley, Pensioner, "for the whole Society," of the other part. Here clearly "the whole Society" is something different from "the Society." If the masters of the Bench had at this time absolute authority, the Pensioner covenanting for the whole Society would have been quite unnecessary as a party. Again in 1469 "it was agreed and established by all the Fellows, as well of the Bench as of the Bar, with their unanimous consent and assent, that every Fellow," etc. Here we have the same body so frequently referred to above as "the Society" or "Fellowship," and it was before this body that John Bradshaw, one of the Governors, made his humble submission in 1475 for "playing cardes at the porter's house of the Rolles in the Chancelare Lane" with divers of the Fellowship. In the same year an ordinance

was passed by "the Governors in general council," and in 1482 certain members were reported to "the Governors and the Society for card-playing in the Inn." It was not till 1489 that we get, for the first time, an ordinance unmistakably passed by the Bench alone. This was made by "the Governors of the Inn for the time being and by all the other Worshipfulls—*venerabiles*—of the Bench." Again, in 1494, "James Hobart, the King's Attorney, and all the other Governors, and all the existing Benchers to the number of fourteen, assembled in the Chapel," to amend the Rules of the Society. From 1496 the orders run in the name of "the Governors and others of the Bench." In 1499 an ordinance is passed "for the good order & Rewle of Lyncolnsyn by the Rewlars and others of the Benche assemblyd to gedyr in the Chapell of o^r Lady." But this was a period of transition; for apparently the Society continued to exercise some authority. For instance, in 1503, certain regulations relating to the Christmas Vacation were made by the Society. But references to the Society are few. The formula changes:—"Agreed by all the Bench;" "Resolved by the Benchers;" "Agreed by the Governors and Benchers, assembled in the Chapel;" "Granted by the Governors and others of the Bench."

In 1507, however, we find a memorandum "that it is agreid by the hole Felishippe of Lyncolnes Inne that Walter Rowdon shall have the highest chamber of the newe byldyng," but in 1510, another states that "Hit was agreed by y^e hool company of y^s Bensh."

In 1511 the word Council comes into use: "It is agreed by the Rewlers in the Common Counsell." In 1516 the Chief Butler produced his books to the "Council," and two years later the proceedings before the Masters of the Bench are headed "before the Council." The officers of the Society, however, continue to be "elected" on All Saints' Day, till 1522, when it is described as a "Council held on All Saints'

3

Day," and when, if not earlier, they ceased to be elected by the Society.

Any Master of the Bench failing to attend, after due notice, any "General Council," was liable under an order of 1519 to a fine of 6s. 8d., and in 1520 we read of a "Great Council" being attended by thirteen Masters of the Bench. We first hear of the Council Chamber in 1545, when the Council held on All Saints' Day met in the "Councell Chamber," showing that the annual meeting of the Society had ceased to be held.

With the narrowing of the governing body arose the institution of Associates of the Bench. In 1505 Saunders and Rowden were "admitted by the Governors to aid and advise the Fellowship of the Bench for the good governing of the Inn." These Associates were not allowed to vote. To what extent this practice was followed we do not know. Hawkes was called to be "Assystaunt of the Bench" in 1530 on payment of £3 : 6s. 8d. Apparently, Associates endeavoured to exercise the right to vote, for in 1468 it was ordered that Associates "should be no further associatte then to borde onlie and to have no voice as other called for lerninges have, no other preeminens of Reders or Benchers."

When a few months later Boswell and Timperley were added to the number on payments of £12 and £8 respectively, the position of Associates was more plainly defined. They were not to "entermeddle with any thinge, but onlie to sitt at the table and take there diett there." In a few instances where special services had been rendered or favours to come were anticipated, Associates were called to the Bench Table without payment of a fine.

As the Records of the Middle Temple only commence in 1501, we should not expect to find much, if any, evidence of the more democratic government which was at this period just dying out at Lincoln's Inn. Nevertheless we find distinct survivals, showing that the constitution had

similar origin, and had developed in the same way as that of the sister Society.

Whatever may have been the authority of the Benchers, it is clear that the Utter Barristers had, at the beginning of the 16th century, a very considerable share in the government of the Inn. In 1501, resolutions of Parliament are passed by the Company—*communiva*- and Utter Barristers were fined 3s. 4*d*. for failing to attend Parliament. In 1502, John Brooks, "at the instance and special request of the whole Company of the Middle Temple, took upon himself again to be Treasurer."

What constituted "the whole Company," or whether there was any distinction between it and "the Company" is not easy to determine. In a full Parliament held on All Souls' Day 1507, the Lent Reader and other officers were chosen, after which the Minutes go on to state that the Fellowship of the Middle Temple in full Parliament exhibited a certain Bill, *i.e.*, "The holye body of the Company of the Middel Temple, praying the Masters and Rulers of the same, that the continuang, relyeff and encrese of lernyng hereafter to be had and kept in the same place, it may please them that certain ordinanncez may be auctorised, establisshid and enacted after the maner and forme as here ensueth." Then followed the desired regulations with the answer in French, "To this they are agreed, unless it be otherwise determined at the next Parliament." As nothing was otherwise determined, the said Act remained in force.

One would suppose that the Benchers were included in "the full Parliament," so that it is a little difficult to see why this petition should have been presented to them. A rule similar to that in Welsh law may have existed, making it necessary, when a change was made in the law, for the new rule not to come into force until the next Parliament had had an opportunity of re-considering it. In the same Minutes we are told that, "The whole Company" withdrew from

the Inn on account of the Plague. The term must therefore have been used for the whole Society. It is significant that the Treasurer Jenner should, in 1515, have been ordered to render his annual account to the Auditors on the following All Souls' Day, "so that the same be openly declared in the Temple Hall in the presence of the Company," and in default to pay to "the said Company 5 marcs."

In 1523, it was decided by "The whole Fellowship that none of the Company should be compelled to keep next Christmas Vacation," and the following year Lyster, Solicitor-General, "at the special instance and request of the whole Fellowship," agreed to be Treasurer for the ensuing year, and was thereupon re-elected. The Fellowship here undoubtedly consisted of the Benchers and Utter Barristers, for in 1551 the latter "who came not to Parliament" were fined 3s. 4d. "according to the rule."[1] They would, however, appear to have lost their power of control by 1524. The following account will show the subsequent struggle to regain their lost privileges.

An order was made in Michaelmas Term, 1630, that Commons should break-up on Saturday, December 11th, until Saturday, January 15th, in consequence, as it was alleged of the danger of infection from the resort of people to the House to see the play. Certain young gentlemen, however, refused to conform to the order, and "on pretence of their liberties (as they termed it) being infringed, whereas no liberty in the House may exempt them at any time from being governed by the orders of the Bench" remained in Commons.[2] They met in Parliament and made an order to that effect, which they entered in a "book which they called their Parliament Book and the Keeper thereof the Clerk of their Parliament. . . . They fined the steward forty shillings, to be cast into Commons that week, and

[1] M. T. Rec., Vol. I, 80. [2] *Ibid.*, Vol. II, 771.

awarded him the Tower for an hour, and did presently put him by strong hand into stocks, which they called their Tower, for refusing to provide the Commons accordingly."[1] The ringleaders, amongst whom was Mr. Lisle, were fined £5 a-piece, but instead of submitting, all those in Commons came up to the Bench Table where the Benchers were at supper and demanded the repeal of the obnoxious order. "Being fairly treated by the masters they went to their places, but came up again, telling the Bench they had given them time, and with insolent speeches pressed for the repeal. This being denied, they hastened down tumultuously, and calling for pots threw them at random towards the Bench Table, and struck divers masters."[2]

Appeal was then made to the Judges by the Benchers, with the result that Dyer and Oglander were committed to the King's Bench Prison, and Lisle and Turner bound over to good behaviour. The Masters would have resorted to expulsion, but on the Judges' advice and upon the submission of the culprits, they remitted the fines and received them back into Commons, contenting themselves with "damning" the rebels' "order" and "dooming" their book to the fire and "ordering it hereafter to be *ipso facto* expulsion for any one to claim any power to govern otherwise than as subordinate to the orders of the Bench."

It is interesting to note that Lisle was John Lisle, the regicide, and that Christopher Turner eventually became a Bencher and a Baron of the Exchequer.

Shortly after this struggle in 1637, the Society having fallen heavily into debt—the "apparels" for Christmas 1635 amounting to £232 : 0s. 2*d.*—the Lord Privy Seal, the two Chief Justices, and Mr. Justice Baskeley, the Arbitrators appointed, took the opportunity of declaring "that the

[1] Worsley's *Middle Temple*, 54.

[2] M. T. Rec., Vol. II, 773.

government of the Society was wholly in the Masters of the Bench."[1]

In consequence of the disorders at Christmas in 1638, "which had grown to such a height that the misgovernment of those times had become a public scandal, whereof the Judges and State took notice," Christmas was prohibited to be kept within the House at all, Commons were to cease on the Saturday before St. Thomas' day, and the Hall doors to be locked till the Saturday after Twelfth day.[2]

In spite of this order, however, certain members, "with their swords drawn in a contemptuous and riotous manner, assembled on St. Thomas' eve in the evening and broke open by violence the door of the Hall, buttery, and kitchen, and set up Commons and play in the Hall." They were eventually summoned before the Lord Chief Justice, and commanded by him, by His Majesty's special direction, to break up their commons and conform to the Order. The Benchers then felt themselves in a position to assert their authority, which they proceeded to do by imposing heavy fines upon the chief offenders and putting the rest out of Commons.

Another outbreak against the authority of the Bench occurred during the following long vacation. "Divers gentlemen of the Bar," runs the record, "vacationers, on whom the government for that time under the Bench did principally reside, and others, wilfully combined themselves, and, in contempt of government, broke up the public commons of the House, committed to the stocks one of the officers, and endeavoured to do the same to others, a kind of punishment the Benchers never assumed themselves."

The ringleaders, two Utter Barristers, were heavily fined and put out of Commons, the Benchers remarking here, "Previous Governors of the Society had specially been

[1] M. T. R., Vol. II, 856. [2] Ibid., 887.

employed in holding together in Commons the company of this Fellowship in their public Hall, as a thing wherein principally consisted the common honour and the peculiar good of every particular member, and without which a company so voluntarily gathered together to live under government could hardly be termed a society."[1]

The last attempt made by the members to obtain some share in the government of their Society took place in 1730, and is fully described by Master Worsley. In their vacation Parliament in Hilary Term, they claimed the right to command the use of the Hall, and the attendance of the officers and servants after Commons had ceased. The same demand was made the following year, and the declaration setting forth their rights and privileges entered in the Buttery Book. They claimed that, although by the constitution of the Society, the order and government was lodged with the Masters of the Bench, "yet a liberty of proposing such occasional alterations and amendments as the circumstances of the times and things might render necessary, was and must be reserved to the other part of the Society in Parliament assembled."[2]

This claim was supported on various grounds, the barristers and students concerned unanimously declaring, "that the power of continuing their Parliament during the whole vacation, after the expiration of Vacation Commons, and in consequence thereof, the use of the Hall and of the due attendance of the officers and servants of this their Society was their undoubted right, and that the maintaining and asserting of the said right, either by representation or remonstrance to the Masters of the Bench, or by any resolution or declaration of Parliament, no way tends to [disturb] the tranquillity or the good order of this Society, and that all resolutions by their masterships to the contrary were high violations of the privileges of Parliament."

[1] *Ibid.*, 899.

[2] Worsley, *Middle Temple*, 50

The rebels might have cited the Petition or Bill of 1507 above referred to as a precedent for this claim to initiate legislation in full Parliament.

Master Worsley's animadversions upon this Declaration of Independence may be taken as the Benchers' reply to the rebels. It is valuable as containing an admission that, formerly, Utter Barristers were required to attend in Hall during the sitting of the last Parliament or meeting of the Benchers in every term. It they failed to attend they were fined unless they had obtained a dispensation from such attendance.

The system of Associates of the Bench appears to have been similar to that at Lincoln's Inn. We first hear of them in 1609 as an established institution. At this period an Associate was expected to present a cup of the value of £10 to the House. These Associates had probably taken the place of the Utter Barristers, who having lost their right to vote, attended Parliaments merely for the purpose of advising the Benchers. We get an explanation of the situation in 1650. Eltonhead, one of the Associates, was by special grace called to "the secret council of the House, and admitted a complete Bencher." In "the secret council" we have the modern governance of the Bench.

The government of the Inner Temple at the commencement of the Records rested in the hands of the Benchers and its administration was entrusted to them. It had become unmistakeably autocratic; and the only trace of democratic rule was the appointment of two auditors from the Bar, a practice preserved to this day. And yet we find traces of the same struggle by the Barristers and Students as at the Middle. According to the Records, the administration of the Inn rested with the Benchers in Term time, with the Barristers in Grand Vacations, and with the Students in Mean Vacations.

Upon the Restoration, the Benchers of the Inns of Court endeavoured to set their respective Houses in order. It was said at the Inner Temple that, upon the occasion of any punishment of wrongdoers, the rest of the Company raised "a mutiny by giving countenance to the person or persons so deservedly punished." One of the most effective means adopted had been to put themselves out of Commons, thus seriously disorganising the life of the Inn by cutting off supplies. Accordingly, to put a stop to this dangerous practice, the Benchers in November 1661 ordered that any so offending in future should forfeit his chamber and "be absolutely disabled from being called to the Bar or Bench, and to be subject to such other punishment as the Bench for the time being should think fit to impose." Relying evidently upon the order of 1661, John Peachy, an Utter Barrister, in the Summer Vacation of 1673, spent about £150 in Commons of the House's stock and treasure, contrary, it was said, to an Act of Parliament and express order of the Benchers. He had also disputed the power of the Bench to make any such order binding upon vacation Barristers and Students, claiming that the latter had the sole power to govern the Society in vacations. For these and other misdemeanours and presumptious claims Peachy was expelled, and only re-admitted upon his humble suit to each individual Bencher.[1]

A much more serious attack on the authority of the Bench took place in Easter Term 1681. Several Barristers and Students having called a meeting in the Hall by blowing the horn, passed several resolutions and orders, threatening the servants of the House in case they refused to screen such orders in the Hall, thereby assuming to themselves the government of the House. Three of the offenders, all Utter Barristers, were put out of Commons, and one of them, Robert Blaney, persisting in his course of action, was

[1] I. T. Rec., Vol. III, 94.

expelled. To show their sympathy with the offenders, the rest of the Barristers and Students went out of Commons the following Trinity Term, and as they were still out at the commencement of Michaelmas Term, the Benchers applied to Chief Justice Pemberton and the other Judges, formerly members of the Inn. Thereupon the rebels immediately came into Commons and all parties were heard, the Chief Justice declaring that the whole proceedings were contrary to the ancient rules and customs of the Society. At the same time, at the request of the Judges, everyone was restored to his position without having to submit to eating humble pie by making personal suit to the Benchers.[1]

As might be anticipated, there is no vestige of any other government at Gray's Inn in the Elizabethan records than a pure autocracy. So far, Mr. Fletcher, the editor of the *Gray's Inn Pension Book*, is correct, but he is mistaken, as we have seen, in his assertion that no instance is to be found at the other Inns of any man below the grade of a Bencher possessed of a voice in the election of Benchers or in the administration of the Society. Neither at Lincoln's Inn nor at the Inner and Middle Temple had members below the grade of Benchers lost all share in administration so "completely that not even a ritual custom survived to be its memorial."[2]

But even at Gray's Inn the tradition lingered that the members were entitled to some share in the administration of the affairs of their own Society. We do not know sufficient to found any argument upon the incident referred to by Pepys, in his *Diary* under date May 1667, "Now the Barristers and Students of Gray's Inn rose in rebellion against the Benchers the other day, who outlawed them, and a great to do; but now they are at peace again." Of this affair there is no record in the *Pension Book*. But in February 1777

[1] I. T. Rec., Vol. III, 161.

[2] *Gray's Inn Pension Book*, XIII.

we get evidence of an attack by the members upon the unlimited authority of the Bench. The Benchers in 1775 had subscribed one hundred guineas towards the relief of the English troops at Boston engaged in suppressing the "American Rebellion," as it was then styled. This subscription formed the subject of a meeting of Barristers and other members of the Society, which ended in a request by them to the Bench for leave to examine the books of the Society. The request having been unanimously refused by the Benchers, a meeting was held on Grand Day of Hilary Term 1776, when resolutions were carried denying the authority of the Benchers to apply the Society's funds in this unauthorised fashion, and requesting "that such resolutions might be entered in the books of the Society as a protest against the authority executed by them in making the late donation, and in order to prevent any improper use of the precedent in the future." These resolutions were formally delivered to Benchers and duly considered by them, and the following answer returned, "That in a full Pension conveyned for that purpose the Bench had taken into most serious and dispassionate consideration their several resolutions, and were unanimously of opinion, founded on the clearest authorities recorded in their Books, that the government of this Society solely resided in the Bench, and, therefore, they had resolved not to comply with their requisitions." The Benchers clearly had the records, which only commence in 1569, with them; but most people will probably agree that they had no right to use the funds of the Society for a purpose in which their own political sympathies were engaged, and which might be and probably were hostile to a large number of members of the Society.

It is apparent, therefore, that the description of the Inns by the old writers as self-governing societies—voluntary societies, unchartered, unincorporated, and unendowed—is truer of them in their earlier stages than it is to-day. The

despotic authority now wielded by the Masters of the Bench, in the administration of their respective Houses, may be justified by their works, but it cannot be justified by an appeal to history. This exercise of unlimited power clearly constitutes an usurpation. I have elsewhere[1] pointed out the close similarity of the Inns of Chancery and the Halls of Oxford University. The latter were originally completely independent and self-governing communities. They consisted of bodies of ten to twenty scholars, one of whom became responsible for the rest to the owner of the house. Rules were framed for domestic government by the scholars themselves, which eventually developed into the Aularian Statutes; the scholar who leased the building was elected by them and became known as the Principal, a title given to the head of an Inn of Chancery. The first exercise of control by the Chancellor was marked by the custom of requiring the Principal to give security for the rent before that official. It was through this custom that the Chancellor was enabled to reject unsuitable persons, and gradually to supervise their organisation, but it was not till 1432 that the Principalship was limited to graduates, and not till the second half of the 15th century that the Chancellor attempted to interfere with the Aularian Statutes, or to impose upon the Halls the Statutes of the University. But the Principal was always elected by the scholars, his *socii*, and it was not till the reign of Elizabeth that the Chancellor acquired the effective nomination. As late as 1857 we find the nomination of the Principal of St. Mary Hall submitted to the Aulares by whom it was approved.

The origin and constitution of the earliest Inns of Chancery was undoubtedly precisely similar. To cite one instance only, Clifford's Inn was originally what we now call an Inn of Court. It was demised about the year 1344 to certain *appentricii de banco*, that is to counsel

[1] *Law Mag. & Rev.*, Vol. XXXVI, 269.

practising in the Court of Common Pleas, and had thus in its institution no exclusive connexion with the Chancery Clerks. Its members were undoubtedly equal in professional status and in wealth and numbers to those of any of the other four Houses. They were paying the same high rent for their premises as the other Houses, viz., £10 a year. At what precise moment the Inns of Chancery lost, and the four Inns of Court first enjoyed the exclusive right of audience in the Courts we do not know. Probably towards the close of the 14th century. But at the time of the foundation of Clifford's Inn, or rather perhaps of the removal of an older association of serjeants and apprentices to new quarters, the institution subsequently known as Clifford's Inn must have enjoyed that distinguishing mark of an Inn of Court, viz., the right of audience in the superior Courts for its qualified members.

Although the Regulations or Rules of Clifford's Inn can only be traced back to the reign of Edward VI, they, no doubt, in the main merely re-state the more ancient provisions. It is sufficient for the present argument to note that, by these Regulations, up to the last election in 1890 of the Principal, this lay with the whole body of the Company, that is to say, every member, from the Principal to the junior student, had the right to vote; and in nearly every case these Regulations correspond with the orders promulgated from time to time by the Inns of Court.

In comparing the evolution of the governing power in the Inns of Court, the Inns of Chancery, and the Oxford Halls, we find that the development from the more free to the less free synchronises in point of time, and was therefore probably due to the same influence. This was the decay and break up of the gild system, of which all these societies were children. In this article I am only concerned with the historical facts. Whether the present constitution, under which a comparatively small body of

co-opted members possess uncontrolled authority over the affairs of their respective societies, is entirely satisfactory, is a question which must be left for future consideration. Speaking generally, public opinion to-day would, I venture to think, maintain that an institution in which the vast bulk of its members have no voice in the administration of its affairs, is out of touch with the spirit of modern ideas. It can only be compared with the benevolent despotism of the Tudor monarchs, which, however benevolent and beneficial for the people at the time, was yet despotism, and which, in the hands of their successors, became despotism without the benevolence. In comparing the present autocratic government of the Inns of Court with the more democratic form, of which I have here given some evidence, one word of caution must be added. In the middle of the 15th century each House, as Fortescue tells us, numbered at the outside 200 all told. A century earlier the number was probably less than half. To-day the members are to be reckoned by the thousand; with large numbers scattered all over the world. Even in the case of those who remain in London, the conditions of daily intercourse which prevailed in the old days, when the members lived a collegiate life, no longer prevail. To this extent the circumstances are not analogous.

HUGH H. L. BELLOT.

IV.—THE ARMING OF MERCHANTMEN.[1]

THE right of a merchant ship to defend itself against capture by the enemy in time of war, and to arm itself for that purpose, has never until quite recently been doubted.

[1] *Armed Merchant Ships.* By A. PEARCE HIGGINS. London: Stevens & Sons. 1914.

The carrying of guns for defensive purposes was a common practice in the British merchant service during the Napoleonic wars. A reminder of those days may still here and there be found in the bulwarks of sailing vessels painted white and black to represent dummy gun ports.

The vessels of the East India Company and the Hudson Bay Company were at one time specially exempted from the duty of sailing under convoy, in consideration of the sufficiency of their armament. In *James' Naval History* some particulars may be found of the armament of three East Indiamen convoyed from the Hooghly in 1809. The *Stratham* and the *Europa*, each of 800 tons register, were armed with 20 medium guns and 10 carronades. The *Lord Keith*, of 600 tons, carried 10 or 12 guns. As late as 1855, the ships engaged in the opium trade were armed for the protection of their valuable cargo against pirates and others. Unquestioned as the right of defence for merchantmen may have been, it was a right that had fallen into almost complete desuetude during the last century so far as this country was concerned.

The revival of this ancient practice on the part of the British Admiralty was announced by Mr. Winston Churchill last year. The new policy was explained by him in the House of Commons, on the 17th of March last, in the following terms:—

> "Forty ships have been armed so far with two 4·7 guns apiece, and by the end of 1914–15 70 ships will have been so armed. They are armed solely for defensive purposes. The guns are mounted in the stern and can only fire on a pursuer. Vessels so armed have nothing in common with merchant vessels taken over by the Admiralty and converted into commissioned auxiliary cruisers, nor are these vessels privateers or commerce destroyers in any sense. They are exclusively ships which carry food to this country. They are not allowed

"to fight with any ships of war. Enemies' ships of war
"will be dealt with by the Navy, and the instruction of
"these armed merchant vessels will direct them to sur-
"render if overtaken by ships of war. They are, however,
"thoroughly capable of self-defence against an enemy's
"armed merchantman. The fact of their being so armed
"will probably prove an effective deterrent alone on the
"depredations of armed merchantmen and an effective
"protection for these ships and for the vital supplies that
"they carry."

This new departure in British Naval Policy was received very differently in different quarters. Lord Charles Beresford declared his conviction that it was equivalent to an addition of 15 Dreadnoughts to our naval resources. Great shipping firms expressed their patriotic readiness and desire to fall in with any recommendations of the British Admiralty, but declined comment. Jurists and shipowners of neutral countries expressed themselves as unfavourable to the proposal—both as tending to enlarge the burdens and operations of naval warfare, and as contrary in spirit if not in letter to the terms of the Declaration of Paris. I have before me a bundle of letters from experts in neutral countries, from Belgium, Holland, Norway and Sweden, who with entire unanimity express themselves as unfavourably impressed by this development of naval warfare, which indeed raises many interesting and serious problems, some of which may be solved in the course of the present war.

The resumption by private merchantmen of the use of defensive armaments, which may apparently include naval guns of any size and in any number which the shipowner or the Admiralty of his country may deem advisable, and may apparently include the strewing of mines to delay or defeat the pursuit of a hostile cruiser, might greatly aggravate the position of neutrals in future naval warfare, and the increased power of naval weapons seems to render it even

more desirable to-day than in the days of the Declaration of Paris, that the use of these improved instruments of destruction should be confined to vessels officered and manned by regular officers and men trained in the observance of the complicated code which ought to regulate naval warfare.

So far no action by armed merchantmen (other than regularly commissioned auxiliary cruisers), whether for purposes of defence or offence, has been reported in the present war. It is, however, interesting to consider some of the legal questions that may arise out of their existence before this war is ended, and in *Armed Merchant Ships*, Dr. Pearce Higgins has very clearly dealt with the position in International law of armed merchant ships, their crews and cargo. These vessels must of course be distinguished from the auxiliary cruisers which both Germany and ourselves have converted into men of war and regularly commissioned. They may be described as "defensively armed and uncommissioned merchant ships."

The right of merchant ships to arm for self defence has, as Dr. Higgins points out, been recently denied by German jurists.

At the meeting of the Institute of International Law at Oxford last year the following rule (Article 12 of the *Manuel des lois de la Guerre Maritime*) was adopted after discussion.

"La course est interdite . . . . les navires publics et "les navires privés, ainsi que leur personnel ne peuvent "pas se livrer à des actes d'hostilité contre l'ennemi. "Il est toutefois permis aux uns et aux autres d'employer la force pour se défendre contre l'attaque d'un "navire ennemi."

Professor Triebel of Berlin opposed the latter clause on the ground that an enemy merchant ship had no right to resist capture, and since then Dr. George Schramm, legal adviser to the German Admiralty, in

Das Prisenrecht in seiner neustengestalt has maintained that there is no legal foundation for the rule allowing a merchant ship to defend itself, and that the crew of such a vessel unless duly enrolled in the enemy forces, would be subject to the criminal law!

The usual view is that they would become prisoners of war, and this view is expressed in the United States Naval Code, and the United States has, it is believed, expressly recognised the status of our armed merchant vessels in the last few weeks.

By the defensive arming of their ship, the crew are deprived of their right under the Eleventh Hague Convention of 1907 to be released, if captured, on a written undertaking not to engage while hostilities last, in any service connected with the operations of war.

In Dr. Higgins' view, the defensively armed merchant ship may, if attacked, lawfully capture its assailant. He does not deal with the question of whether such a vessel may lawfully assist a sister ship which is the subject of attack. Probably not, but the situation might well strain the conscience of an English merchant captain.

The position of neutral goods on board a defensively armed merchant ship, may create some difficult questions for our Prize Courts. Neutrals will obviously incur some additional risk in shipping goods by these vessels. For the law as to their position is far from clear. In almost contemporaneous decisions in 1814—1815, Lord Stowell in *The Fanny* (1 Dods. 448), and the United States Supreme Court in *The Nereide* (9 Cranch 441), expressed opposite views. Lord Stowell, dealing it is true with a case of a vessel armed with 16 guns and carrying letters of marque, held that prize salvage was payable by the owners of neutral goods on board. The United States Supreme Court held that neutral goods on an enemy armed merchantman, were not liable to confiscation under American Prize Law.

Dr. Higgins expresses the view that neutral cargoes placed on merchant ships which may be converted into warships under the terms of the Hague Convention 1907, would be liable to be condemned, while those placed on armed but uncommissioned merchant ships should, under the Declaration of Paris, be released. It is not, however, clear that the Declaration of Paris governs the matter, still less what view a German Prize Court might take of the case.

The hitherto recognised laws of naval warfare may possibly suffer some unexpected usage before the present war is brought to a conclusion.

C. A. McCurdy.

V.—REPORT OF THE COMMISSIONERS OF PRISONS AND THE DIRECTORS OF CONVICT PRISONS FOR THE YEAR 1913-14.[1]

THE present Report shows several satisfactory features. The first is that there continues to be a decrease in the number of prisoners received under sentence. The total number of prisoners received under sentence was 151,603; and as in the previous year, 1912-13, the number was 166,023 there is a substantial decrease amounting to 14,420. Another way of looking at this question is to compare the daily average prison population of the two years. This shows that in 1912-13 the average population in local prisons was 15,534, and in convict prisons 2,876; whereas in 1913-14 the average was 14,352 and 2,704 respectively. This shows a decrease of 1,182 in local prisons and 172 in convict prisons.

The Commissioners give a table showing the number convicted on indictment and summarily from 1899—1900,

[1] Parts I & II. London: Wyman & Sons. 1914.

to 1913–14. From this statement it appears that in 1899–1900, of the persons convicted on indictment, 753 were sentenced to penal servitude and 6,441 to imprisonment, etc., making a total of 7,194 against 7,738 convicted in 1913–14, made up of 797 sentenced to penal servitude and 6,941 to imprisonment. This does not at first look like an improvement, but it must be remembered that the population of England and Wales had increased by something like 5,000,000 and the proportion of convictions per 100,000 of population, according to another table, is 2·4 sentenced to penal servitude, and 20·3 to imprisonment in 1899–1900, against 2·2 and 18·8 in 1913–14. The number convicted summarily in the former year was 146,266, this went on increasing, till in 1904–5 it reached 189,180. Since then it has almost invariably decreased, till the figure for 1913 is 128,656, by far the lowest on record. The proportion per 100,000 of the population of the country, taking the total receptions on conviction, is 360·5. The proportion in 1904–5 is 586·2. The present figures are a substantial decrease on the preceding year, which marked the lowest point within statistical record.

An interesting attempt has been made to ascertain the number of *individual* prisoners incurring the 136,424 convictions, and it was found that 19,666 males and 10,170 females were committed more than once during the year, which showed that the total convictions were increased by not more than 82,344 males and 22,699 females, or a proportion of 287 per 100,000 of population. We should think that, considering how often some offenders receive a number of short sentences, the proportion might have been estimated as even lower. The much larger proportion of women convicted more than once is easily explained by the nature of their offences.

The principal decreases since 1904–5 are in the number of persons convicted summarily. In fact, out of a total

... of 61,517, the decrease in these convictions amounts to no less than 60,494. The Commissioners sum up in paragraph 9: "We referred last year to the need of caution in drawing deductions from statistics of imprisonment, but the remarkable decrease in the number of prisoners received after conviction for indictable offences (chiefly under larceny), during the last ten years, being no less than 7,209, is a most favourable symptom, for it is crimes of this character, *i.e.*, larcenies and the various acts of dishonesty, which make up about fifteen-sixteenths of the total number of indictable offences, and it may be generally regarded as an index to the law-abiding instincts of the community."

The Commissioners give credit for "the gradual diminution of anti-social acts bringing the offender to prison, to a variety of causes—the efforts of those working at the prisons themselves," the work of Borstal Committees, "the notable revival of zeal and efficiency in the work of Discharged Prisoners' Aid Societies, the work of Lady Visitors, Chaplains, etc." They give a long quotation from the Report of the Chaplain of Knutsford Prison, from which we may give a few passages. It begins, "Officers of long service affirm that prisoners are quieter and more amenable than in days gone by. This is due no doubt to education, and the higher level of conduct prevailing in the general community to-day; but it is also due to the humanity of the modern prison system." "The greatly improved conditions of prison life and labour impress upon offenders the fact that their welfare is desired and their reformation hoped for by the community." "Men are surprised to find, as their sentences proceed, that they are healthier, more vigorous, and in every way in improved condition. They begin to set a higher value on the quieter joys of life, such as reading, and to appreciate as never before the meaning and value of religion."

The Commissioners note with satisfaction: "(1) the remarkable diminution in the commitment to prison of young persons under 21 years, and (2) the falling rate of re-conviction in the case of younger categories of prisoners." They give two tables, one of which gives the age on conviction and the proportion per cent. which each category bears to the total, and the other gives the falling rate of re-conviction. The first table shows that the convictions of males under 21 was in 1902–3 in the proportion of 11·6 of the whole, and in 1913–14 it was 6·1. In the cases of females it was 4·8 in 1902–3, and 2·5 in 1913. When we take those where the ages are 21—30, we find that the figures have fallen from 26·7 to 24·8 for males, and from 25·3 to 18·4. For the more advanced ages, of course, the proportion rises.

The second table shows that the number of males who had one previous conviction was in 1902–3, 32·9, and in 1913–14 it was 24·1; of two previous convictions the proportions were 14·9 and 11·9. As regards females, the proportion of those who had one previous conviction was in 1902–3, 17·0, and in 1913–14, it was 14·7. It will be remembered that 136,424 persons were received on conviction during the year. Of these 103,010 were males and 33,414 females. Out of these 64,964 males and 26,341 females had been convicted before, or a percentage of 63·1 and 78·8 respectively. As might be expected, the proportion of persons sentenced to penal servitude who had been previously convicted is a good deal higher, as no less than 87 per cent. had been previously sentenced to imprisonment or penal servitude. On these figures the Commissioners remark: "If these figures can be quoted as showing that a sentence of penal servitude neither deters nor reforms, they also support the inference that grave crimes punished with a sentence of penal servitude are the work of a handful of confirmed recidivists, whose ranks are not being recruited by those without criminal antecedents."

Both the difficulty of dealing with this class and the fact that it is not hopeless is shown by the report of the Central Association for the Aid of Discharged Convicts. This Association was founded in 1911. Its report is given in full in Appendix 17A, and is well worth reading. The Commissioners refer to the work of the Association in some detail and give the following figures: "Since its foundation in 1911 the following numbers have passed through its hands each year, 1,147, 878, and 761. Of this body, the numbers still out of prison on the first of April last were 555. 511, and 553. Of those discharged during the past year, the numbers in the "Star," "Intermediate," and "Recidivist" classes were respectively, 84, 170, and 508. The number re-convicted in each category was 1, 43, and 164. As we pass, therefore, from the "Star" or "First Offender" category, the difficulty of successful after-care becomes manifest; thus, while only one "First Offender" was re-convicted, the re-convictions in the case of "Intermediates" and "Recidivists" were 25 and 28 per cent. respectively." The report of the Association points out very clearly the great difficulties released convicts have in getting and keeping honest employment, weakened as they often are in mind and body by a long term of imprisonment. What seems to us a valuable suggestion is made, that, when a man is excused from serving part of his sentence, he ought to be so excused on condition that he will not return to an unpromising neighbourhood. They point out that such a form of licence is already in use for men discharged from preventive detention, and for boys discharged from Borstal Institutions.

While these efforts are being made by the Central Association to deal with what they describe as "the stage army of recidivist outlaws," the intermediate population between the two extremes of the criminal world,

namely, the inmates of local prisons, are not being neglected. The Commissioners state that they have been "at great pains during recent years to strengthen, and, if possible, to improve the formal machinery for after-care in local prisons, i.e., the Discharged Prisoners Aid Society." The new scheme only came into operation on July 1st 1913, and is reported to be working successfully. One important feature of it consists in the abolition of the gratuity system, and an increase of the Government Grant. The funds resulting from these alterations have been placed at the unfettered disposal of the local Discharged Prisoners' Aid Society. It is hoped that this extended liberty of action, combined with an improved financial position, will greatly strengthen the Societies in their benevolent work.

A very important attempt was made "to protect the community from the predatory instincts of re-convicted men" by the Prevention of Crime Act 1908. As is well known, the Act enables the Court to pass a sentence of "preventive detention" on an offender, in addition to a sentence of penal servitude, when he has been found by the jury to be an "habitual criminal." The sentence of preventive detention cannot be less than five or more than ten years. The Camp Hill Prison was only opened for this purpose in March 1912. From the Governor's report it appears that, since then, the Advisory Committee have recommended nine cases for release on licence. Three of these have had their licence revoked and have returned. Five seem to be doing well, and one has disappeared. It is worth noting that one of them "had served just two years, and the others considerably less," which shows that, whatever the sentence of the Court may be, the case will receive thorough investigation, and "the man will be recommended for release when he shows satisfactory promise of reform, and suitable work can be found for him." The numbers in custody had increased from 105 to 183. Since

the Act came into force in 1909, 438 persons have been sentenced to preventive detention. The Commissioners pay a tribute to the valuable services of the late Sir Douglas Straight on the sub-committee of the Advisory Committee.

Attention is also called to the Long Sentence Division, which is a new feature of our penal servitude system. It was established in 1905 for selected convicts who had served more than 7½ years. "The object of the new rule was to introduce some alleviation into the lives of men who had passed through the stages of penal servitude with industry and good conduct." There have been placed in the Division 270 males and 15 females, or about 80 per cent. of those whose sentence qualified. "Governors of Convict Prisons are unanimously of opinion that the introduction of the system has been a marked success." The Commissioners are now considering whether there could be with advantage a reduction of the qualifying period. Another new classification which deserves attention is that of the "Aged Convict" class. This class consists of some 50 men over sixty-seven years of age who are broken down and physically feeble. They have cells specially fitted up, and special clothes and diet. They are, during the day time, associated in a large room with an adjacent parlour, and expected to do some light work. The experiment has been successful, and it has not been found that, generally speaking, they abuse their privileges.

Much attention is devoted in this Report to what is probably the most important question of all, namely, how to deal with the youthful portion of the law-breakers so as to cut off the supply of criminals at its source. The first thing is, of course, as far as possible, to keep the young out of prison. The importance of avoiding, if possible, committing young offenders to prison has been urged again and again in these Reports. A very large number of young offenders are every year committed

to prison in default of paying a fine. In the year under consideration, out of 128,686 received on *summary* conviction, 74,461, or 58 per cent., were received in default of payment of a fine. The Commissioners remark, in par. 27, "If the automatic commitment to prison in default is in many cases unnecessary and harmful, in the case of adult offenders, the evil is of course greater in the case of the young or adolescent offender, 16—21, who, it may be in consequence of some trivial offence—breach of local bye-laws, or otherwise—makes his first acquaintance with the interior of a prison, not because the safe custody of his person is necessary for the public protection, but because he is unable at the time to pay a fine which is often insignificant in amount. Thus, during the past year, no less than 768 lads went to prison in default of paying a fine of 10*s.* or less. Of 3,820 juvenile-adult prisoners who were sentenced to *one month or less*, no fewer than 2,254 or 59 per cent. were committed in default of payment of a fine."

It is unnecessary for us to quote condemnation of such results, and suggestions for the improvement of the law made by various prison authorities, as most of the recommendations, and those which have been made by the Commissioners, have been incorporated in the Criminal Justice Administration Act, which became law this year. The Act puts upon the magistrates an obligation in most cases to allow time for the payment of fines, and gives them the power to place the offender under supervision till the fine is paid. It makes provision for further time being allowed when proper, and provides for the recognition and subsidising of what we may call "Protection Societies." These provisions, which had not yet become law when the report was drawn up, meet with the warmest approval of the Commissioners, who remark, "We attach the greatest possible importance to these proposals, which are calculated to be of far-reaching effect, not only in saving thousands of

young persons from the stigma of imprisonment, but in bringing into the lives of such persons at the most critical age, a kindly supervision or guardianship, which may be the occasion of turning many from a criminal career."

The report devotes a good deal of consideration to the Borstal System. Out of the 6,320 male prisoners received into prison between the ages of 16 and 21, 442 were sentenced to detention in a Borstal Institution; 1,523 were sentenced to over one month and so came under the operation of the "Modified" Borstal system. Female prisoners to the number of 858 were received between the ages of 16—21, 45 of whom were sentenced to detention in a Borstal Institution, and 729 treated under the "Modified" Borstal system. In addition, 1,098 females up to the age of 25 were brought within the operation of this system. Some extracts from the reports of the Governors of Borstal Institutions may help to show what sort of difficulties they have to deal with. The Governor of the Institution at Borstal, after observing with satisfaction that only four of these receptions had been sentenced to 18 months and one to 12 months, goes on to say, "I am more than ever convinced that the very best form of work for these inmates, with very few exceptions, is hard labouring work." "To my mind, and I speak after fair experience, the one thing to be guarded against in Borstal Institutions is forcing the minds of the inmates beyond their capacity. Only those who live among them, as we do, can realise the extraordinary lack of intelligence they display when they first come to us. Crafty they are, and wonderfully clever at being deceitful, and it is only by constant watching and admonition, that they begin to see that there is another side of life to the one in which they have grown up." "The present means of punishment are inadequate; dietary punishment and close confinement being to my mind,

objectionable from all points of view. What is really required is the power of administering some form of corporal punishment as soon as an offence is committed. The power should be vested in the hands of the Institution Board and I feel sure that the fear of it alone would prevent many inmates from committing themselves."

On examining the table of "restraints, punishments, and offences," we find that of Borstal Institutions Canterbury enjoys a bad pre-eminence, as 12 of its inmates had to be restrained with irons or handcuffs, and 13 committed to close confinements in special cells for refractory and violent conduct. The total number of prisoners punished was 52, and not punished 7. Canterbury, of course, has a worse class of inmates than either of the other two institutions. Borstal, out of its 657 inmates, had 148 punished and 509 not punished. Feltham had 590 prisoners, and of these 183 were punished and 407 not punished. It is noteworthy that at Feltham there were no less than 63 cases of violence. It appears from another table that two cases of gross personal violence to an officer at Feltham were punished by corporal punishment.

The Borstal Association reports of the 411 boys discharged last year, 327 (i.e., 79 per cent) have been satisfactory, 12 have been lost sight of, 41 have been unsatisfactory, 6 are on remand on a fresh charge, and 25 (i.e., 6 per cent) have been reconvicted. More instructive, however, are the figures of all lads discharged since the Act came into operation in 1909. During that period 1,0[illegible], have been discharged, 697 have not been reconvicted and were satisfactory when last heard of, that is nearly 67 per cent, 94 were unsatisfactory but have not been reconvicted, and 252 (or 24.27 per cent.) have been reconvicted. "That is to say, [illegible] 75 *per cent. have not been reconvicted*." The proportion of girls reconvicted on the whole is about the same, but the last year's figures are not as satisfactory as those of the boys, as 11 per

cent. have been re-convicted and 66 per cent. have been satisfactory.

The success of the Borstal system and the increased use made of the Act by the Courts have influenced the authorities to propose to open a new Borstal institution at Lewes, and also to modify the medical certificate required by the Act. The increased accommodation is rendered necessary, not only by the fact that the present accommodation is insufficient, but also that under some of the provisions of the Criminal Justice Administration Act there will be a considerable development and extension of the Borstal principle. The Commissioners point out that under these circumstances "the time has come when plans must be made for the creation of new establishments, specially designed *ad hoc*, and offering opportunity, specially in the matter of land cultivation and strenuous employment on manual labour."

The Borstal Committees are also doing excellent work in their after-care of young persons released from local prisons. One of the most successful of these is the case of the committee at Bristol, to whose work attention is particularly called by the Commissioners. During the last five years 402 lads have passed through the hands of the committee. Of those only 29 have been lost sight of and 43 re-convicted; 17 are not doing well, but the committee consider that 301 are on the road to success. As an element in the problem it is worth noting that the offenders in question "do not necessarily belong to the criminal classes, and in many cases are not the victims of bad environment, bad homes, and evil influences from an early age." A careful investigation made by the chaplain of Wandsworth Prison, of no less than 1,078 cases, satisfied him that so large a proportion as 79·3 per cent. came from "good homes." At the same time he found that out of the 855 prisoners reared in good homes, "407

possessed a history of excessive use of alcoholic stimulants." He considered it an established fact from those figures "that crime and drink are closely associated in the downward career of half the decently-raised young fellows who eventually join the ranks of the habitual wrong-doer." There is much more worth attention in this interesting Report, but space does not do more than allow us to quote the reference to the police. "It is satisfactory to note how, in many parts of the country, *e.g.*, at Durham, Knutsford, Northampton, etc., warm testimony is given by those interested in the future of these lads to the assistance they receive from the police authorities, in their attempts not only to keep this class out of prison, but to reinstate and continue them in honest life. We have always held the view, which we have more than once expressed to the Secretary of State, that the police furnish a most valuable auxiliary to preventive work of this nature, and it is our hope, in any future system for the care and control of young persons lapsing into criminal habits, that full use may be made of the services of that admirable body of men to be found in all police forces."

VI.—HOLLAND AND THE SCHELDT.[1]

THE uneasy equilibrium of Europe at the present moment has led to general attention being drawn to what would otherwise pass without much comment—the proposed fortification of Flushing, at the mouth of the Scheldt, and the general strengthening of the sea defences of Holland. It may be suggested to those who see the

[1] The substance of this article was published in the February Number of this Magazine, 1911, in "Current Notes on International Law." It is republished by special request, the Author, Dr. Th. Baty, D.C.L., LL.D., having brought it up to date by the subjoined note.—*Ed. L. M. & R.*

Machiavellian hand of Germany behind these proposals, that Holland is strong against armies, and weak against navies. What the forces of Alva, of Louis, and of Cumberland could not do, it is improbable that the troops of other Powers could accomplish. The invincibility of the Dutch method of defence by inundation has long been a proverb. But against naval attack, inundation is powerless. Let it be conceived that Germany were desirous of violating the neutrality of the Netherlands, and of using the Dutch ports as bases for action in the North Sea. Let, then, Germany move against the Netherlands land frontier: she has a long and costly campaign to face before she can attain her end, if she ever does. Let her, under the same circumstances, effect a *coup* against the Netherlands sea-frontier: she may succeed at once. It may well be, therefore, that it is the growth of the German navy that has stimulated the attention of Holland to her sea defences. The British navy is not suited to the operation of attacking these shallow waters: the German navy is especially designed to manœuvre in shallow seas, such as are found on the Frisian and Baltic coasts. The *Times* correspondent admits the force of this reasoning, but as it hinges on the efficacy of the inundation-defence, he dismisses this cardinal consideration with the remark that (1) the inundations have never been tried; (2) the *waterstaat* "will in all human probability act too late." The latter observation is obviously beside the mark, unless the Dutch Government concurs in it (since it is the intentions of the Dutch Government which are at issue); and if it does, it is singular why it should maintain a *waterstaat* at all.

But it is hinted that European treaties render it improper for Holland to seek to command the access to the Scheldt. Antwerp lies higher up that estuary and might thus be cut off from the sea. The Four Powers have promised to

protect Belgium. We can only say that the argument cuts both ways. If a foreign Power were to violate the guaranteed neutrality of Belgium, and to invest or occupy Antwerp, the new fortifications would be inestimably valuable in bringing that Power to book. It cannot be assumed that power will only be used for purposes of illegality. If Holland is legally entitled to make herself strong on the Scheldt, we have no right to presume that she does so with improper and illegal motives. She was called upon to make great sacrifices for the peace of Europe, in 1830: that is no reason for expecting her to make further sacrifices now, and to regard the sacred stream of the Scheldt as a thing taboo. We are gravely told that Descamps, Guillaume and Nys all maintain the view that Holland is bound by all the engagements regarding Belgium and the Scheldt which the Four powers made with each other in 1831, when they created the kingdom of Belgium, that she is bound by some nebulous doctrine to refrain from doing anything which might conceivably hamper them in their future protective tenderness towards their Orion child. But each one of these three gentlemen is an eminent Belgian!

The Dutch jurist, Den Beer Poortugael, brushes away the flimsy contention, and lays down the sound principle, and the only safe one, that nothing that the Four Powers did can affect Holland, save in so far as she expressly agreed to it. An undefined quadruple supremacy over the Scheldt would be a monstrosity which fortunately does not exist.

A more important question is whether, assuming the forts to be built, they could be used in order to deny a passage to troops coming to maintain the neutrality of Belgium. Holland does not claim to be able to do this in time of peace. In war, the usual theory of the right of a neutral to refuse passage to warlike expeditions would seem to justify her in closing the Scheldt. Many authors question

whether a nation can ever concede, even expressly, to another, liberty to use its territory or waters for the purpose of attacking another. Much less can it be obliged by an implicit understanding of a nebulous and uncertain character to do so. True, an onslaught upon Belgium would be an international wrong. But if Holland desired to resent it, as such, it must be by war, or by steps which would inevitably involve her in war. There is no obligation upon her to act as policeman, to pronounce judgment upon the wrong-doer and to allow his enemies the hospitality of her waters.

It is impossible to suggest that Holland has expressly bound herself to permit the transit of warships along the Scheldt. The interminable correspondence at the time of the separation of Belgium (see Brit. State Papers, Vol. XIX, p. 54 *et passim*) is directed to the securing for Belgium of commercial advantages, and commercial advantages only. The definitive treaty with Holland (which was not signed until 1839)[1] merely applies to the Scheldt the general principles of the Treaty of Vienna (Arts. CVIII *et seq.*) of 1814. These are limited to a grant of free transit "*sous le rapport du commerce*"; and while the Belgian war was going on, the right of Holland to close the Scheldt entirely was practically admitted. Consequently, the Belgian advocates are forced to rely on the shadowy assertion that Holland is bound in some unknown way to make things smooth for the Powers which undertook the protection of Belgium.

It is well known that the Dutch king only yielded in the very last resort to the creation of Belgium, and that, largely because he was left with the control of the Scheldt. Imagine his astonishment if he had learnt that he was never to fortify it! The *Times*' correspondent, who advocates with so engaging an air "Dutch-Belgian" solidarity, might have reminded his readers that, but for Belgium and

[1] Brit. S. P., XXVII, p. 990.

her backers of 1830, the Low Countries would have formed one kingdom to-day.

It is to be regretted that the campaign against the Dutch defences was initiated. Suspicions often produce realities. The effect of the imputations may be to bring about the Netherlands-German combination, which is so greatly to be deprecated.

NOTE:—The application of the above considerations to the present unfortunate circumstances is readily made. In the view which has been put forward above, the Scheldt at its mouth is as much Dutch territory as the *Zuider Zee*—much more so than the Belts and the Sound are Danish. There can be no doubt that Holland is entitled to deny its passage alike to either belligerent combination for offensive purposes. It is understood that Holland prevented its passage for the exit from Antwerp of Belgian prizes. If that be so, she is bound, not only by the modern strict conception of neutrality, but by the much older rule of impartiality, to refuse its passage by ships bent on warlike missions to and from that city. It is difficult to understand, however, in what way duly condemned prizes differ from other mercantile vessels: and it may be that it was not a Dutch interdict, but other considerations, which prevented the Belgians from sending the ships away. In that case, the rule of impartiality could not be invoked: but it would still remain, in the modern view, improper for Holland to permit her waters to be traversed by an armed belligerent force. It is not like the case of the resort of a fleet at sea to a neutra port, or its casual transit of the three-mile limit, in which cases of "*simple passage*," Art. 10 of The XIII Hague Convention of 1907 rightly sees no violation of neutrality. Such a fleet is exercising its general practice of visiting the open harbours and the open waters of a friend. But foreign ships are out of place in the inland waters of a State. The

Scheldt is such an inland water, and although, by a special exception, Holland cannot object to its commercial use, foreign ships-of-war are out of place when they navigate it. Here there is not "*simple* passage." The concession of such a privilege would be incompatible with the neutral duty not to furnish one belligerent with the means of harming another. Of course, it would equally apply to the case of British ships ascending the river to bombard Antwerp. The establishment of a base at Antwerp, from which craft would habitually traverse Dutch territory as a passage to and from the North Sea, would therefore at once oblige the Netherlands to declare for one or the other belligerent. It would amount to making Dutch territory a base of operations. Germany has much easier means at command of precipitating such a conclusion. As the *Times* observes: "It is the irony of the situation that the view, which Dutch philo-Germans favoured, places Germany, now that she is in possession of Antwerp, in a dilemma—either to be unable to make much use of it, or to violate the neutrality of Holland."

The Danes appear to deny the Belts and Sound to all belligerents. In a previous issue, we came to the determination that their claim to these waters is probably justified. They have a clear right to prevent their being used for warlike purposes. But have they any duty to do so?

It is a somewhat difficult point: for there is no doubt that the mere transit of territorial waters by a cruising belligerent need not be prevented. Yet, where the transit is not a casual circumstance in the voyage, but is of such direct military service as to be comparable with the use of that territory as a base, the duty of the neutral seems to be to forbid it. A little reflection will show why this should be so. If a vessel is making a voyage, and in the course of it puts into neutral ports, or traverses neutral territorial waters which she might, if she chose, skirt instead, she is doing

what may indeed be necessary in order to enable her to do ultimate damage—but there is no single crucial and vital point which it is necessary for her to use. She can be attacked by her enemy at any point of her voyage.

If she makes use of one neutral port with immunity, she may be destroyed in issuing from another. Links, and necessary links, in a chain, there is no reason why they should all be broken for her by their neutral owners. But in the case of the Scheldt and the Danish channels, passage of the territorial water is an eminent and vital feature of the voyage. The use made of the channel is not only necessary but unique. In other words, the ordinary resort to a victualling port is necessary to the cruiser, but not nearly sufficient: the passage through the bottle-neck is necessary, and may be sufficient as well. It is true that the passage of the Sound was permitted to the allied fleets in 1854, but neutral obligations had not then been raised to the perhaps over-anxious pitch to which the *Alabama* affair subsequently elevated them.

TH. BATY.

VII.—THE LAW OF PRIZE.[1]

NO Prize Court has sat in this country since Dr. Lushington, 60 years ago, decided a small number of important cases arising out of the Crimean War. Even in his day marked changes had occurred in navigation, commerce and trade since Lord Stowell, in the Revolutionary and Napoleonic Wars, laid down the principles of our Prize law. The methods of conducting warfare had changed also; and at the present day the changes are still greater. The ships subject to Prize law are no longer sailing vessels of 300 to 400 tons, dispatched on an adventure in which the master was often jointly interested

[1] *Prize Law.* By Viscount Tiverton. London: Butterworth & Co. 1914.

as owner. In burden and means of propulsion, the change is not less remarkable than in the diversity of interests in ship and cargo. The owner of a vessel is rarely the owner of the cargo, and cargo-owners are as often as not of different nationality from the owners of the ship. The vessels, whether tramp steamers or mail boats, are enormously larger, and it is the rarest occurrence that the owners of the ship and cargo are the same.

Within the same period noteworthy changes have been made in jurisdiction, procedure, and the material law of prize. The Naval Prize Act of 1864, the Prize Courts Act of 1894, and the Prize Courts (Procedure) Act of 1914 with its elaborate rules, are all being put in force for the first time. Immense changes have been made, too, in the material law of prize by Conventions to which Britain is a party. The Declaration of Paris of 16th April 1856, conceding immunity from capture to enemy goods under the neutral flag, and to neutral goods under the enemy flag (in each case saving contraband of war), the Hague Conventions of 1907 on the status of enemy vessels on the outbreak of hostilities, on the conversion of merchant vessels into war vessels, on certain restrictions on the right of capture, and finally on the rights and duties of neutral States in maritime warfare, are subjected for the first time to the test of a great naval war. And to these Conventions, imposing limitations on the rights of the Crown, there is now added one of a different class, the Declaration of London, which, with certain modifications, is declared by Order in Council of 20th August 1914 to be binding on Britain, while M. Renault's Explanatory Report is, without any modification, declared to be binding on our Prize Courts.

Under the Acts now in force, jurisdiction in Prize resides in the High Court of Justice, and all matters of Prize are assigned, subject to Rules of Court, to the Probate, Divorce and Admiralty Division of the High Court, with appeal to

the Judicial Committee of the Privy Council. The matters in which the Prize Court has jurisdiction fall into the two main classes of Droits of Admiralty and Prizes of the Crown, with cognate matters of prize salvage, joint capture, bounty, petitions of right.

The right of the Crown in prize being a prerogative right may be waived or limited by Treaty, Convention, Order in Council, or Proclamation, and such limitations bind the grantees of the Crown. But the prerogative of the Crown cannot be extended beyond the limits of municipal law to prejudice the rights of owners of property by mere declaration of the Crown itself. How far the Declaration of London, as construed by M. Renault's Report, may limit the rights of the sovereign is not yet clear, though many difficulties are certain to present themselves for solution.

With very commendable brevity, Viscount Tiverton has succeeded in stating the main rules of Prize law in a chapter headed General Law. There is little in the statements themselves to excite comment, though the references in the foot-notes show every variety of authority from decisions of Lord Stowell and Hague Conventions to a Royal Proclamation so recent as the 20th of August. The most important part of his book is an analysis, running to just less than 100 pages, of the elaborate Procedure Rules of the Court of Prizes, framed by a Committee under the Chairmanship of Mr. Butler Aspinall, K.C., the well-known Admiralty lawyer, and issued shortly after the outbreak of war. The analysis, with its comments and references, cannot fail to be useful to practitioners before the Prize Courts.

Prize Court procedure is now regulated by the Rules of Court in Prize Proceedings which came into force on 5th August last, in substitution for Rules made by Order in Council of the 18th July 1898 and 20th October 1898. These rules are of an elaborate nature with Appendices of

Forms, Tables of Court Fees, and Tables of Practitioners' Fees. They make great and important changes on traditional Prize Court procedure. As before, it is the duty of the actual captor to deliver up the ship to the Marshal and file the necessary affidavit of papers. But, whereas it was formerly his duty to put in a libel, *i.e.*, to petition the Court to hold an inquiry, the rules now direct that every cause for condemnation as prize, whether the ship and goods are brought in, or whether they have been destroyed, lost, or in the case of goods removed from the ship, must be instituted in the name of the Crown by its proper officer, although the Crown may, through its proper officer, allow the proceedings to be conducted by the captors or any parties to whom the ship would be condemned as prize. The proper officer is the King's Proctor, or other law officer or law agent for the Crown, authorised to conduct Prize proceedings on behalf of the Crown within the jurisdiction. The writ cannot be issued until a statutory affidavit as to the ship's papers has been made by the captor. The writ is a direction to owners and parties interested in the ship or cargo, to enter appearance within eight days after the service of the writ, and a warning that, in default of appearance, the Court may proceed in the cause and give judgment in absence.

A still more important alteration relates to the evidence competent at the hearing of a cause in Prize. In Lord Stowell's day the next step after notice to interested parties to appear, was for the Court by its own officers to examine the captured vessel, its papers and cargo, and to administer interrogatories to the persons found on board. At this stage the captors were not examined, nor were they allowed to examine the claimants or the captured persons. The evidence taken by the Court was called evidence in preparatory on which counsel for the interested parties were entitled to be heard. The Court,

if possible, gave its decision on this evidence alone. If further proof were allowed, the proceedings then took more closely the form of a trial between litigants, the captors and claimants produced evidence, led argument, and finally judgment was given. In the new rules evidence in preparatory is abolished. Under Order XV, r. 2, the evidence to be given at the hearing in causes for condemnation of ships other than warships is thus summarised by the author:—

1. The affidavit as to ships' papers and exhibits thereto;
2. Affidavits of the officers of the capturing ship;
3. Evidence, either oral or upon affidavit, of witnesses tendered by any party; and
4. Such further evidence as the Judge may admit.

Provision is made for taking evidence before the hearing, with the consent of the Court, before the Judge or Registrar or an Examiner appointed by the Court.

Lack of space prevents us from dealing with the further elaborate alterations in procedure, the general effect of which is to model Prize Court proceedings to the forms of an ordinary litigation. In its present shape, a cause in the Prize Court has but the remotest resemblance to an inquiry on the Admiral's quarterdeck. It can hardly be described with Dana (Note 186 to Wheaton's *International Law*) as an inquest held by the State upon certain property to discover whether it has been lawfully captured or not.

The alterations in the material Law of Prize since Lord Stowell's day are much more important than the alterations in procedure. How far the decisions of Lord Stowell are binding on the Prize Court it will be for that tribunal to decide, but as the author points out, these decisions purport to apply the law only as it existed at the date when given; for they profess to accord with the Law of Nations, and

this being founded on reciprocity is clearly susceptible of alteration and improvement. The alterations by treaty are numerous and extensive, and so far as the treaties are ratified by all or most of the belligerents, they may well be taken to form part of the Law of Nations. In their essence they are primarily limitations on the rights of the Crown, which the Crown may enforce at its pleasure. Unless incorporated by Act of Parliament, they do not alter the municipal law and cannot prejudice the rights of a subject. Most of the Hague Conventions, *e.g.*, those on Days of Grace, Restrictions on the Right of Capture, Conversion of Merchant Vessels, and the Rights and Duties of Neutrals, fall within the former class. Difficult questions as regards the rights of neutral subjects, will no doubt come before the Court under the Declaration of London, which regulates the right of belligerent interference with neutral commerce during war. The Government has taken advantage of the unratified state of this famous instrument to make important modifications on some of its principal provisions. These are set forth in the Order of Council of 20th August above referred to.

It is worth pointing out that the critics of the Declaration who maintained that its rule adopting the doctrine of continuous voyage in absolute and excluding it in conditional contraband, would, in a war between this country and a Continental Power, afford our opponent a permanently open back-door in an adjacent neutral country, are amply justified by one of the modifications which the exigencies of the present war has forced the Government to make. As regards continuous voyage the modification does nothing less than abolish the distinction between absolute and conditional contraband, all for the purpose of cutting off the supplies which might reach Germany through Holland. Under section 4 (5) of the Proclamation of 20th August, and notwithstanding the provisions of section 35 of the

Declaration of London, conditional contraband is to be treated like absolute in respect of hostile destination. In neither case, therefore, is the neutral destination of the carrying ship to be conclusive of the ultimate innocent use of the goods. Henceforward, coals and foodstuffs which are conditional contraband will, if they can be shown to be destined for ultimate conveyance to German authorities, be liable to British capture in neutral vessels even if bound for a neutral port, such as Rotterdam. These highly important modifications required to be completed by a provision regarding hostile destination. The much-debated Article 34, with its statutory presumptions of ultimate hostile use, depending as they did upon the character of a port and the status of the consignee, applied only where the port was in territory belonging to or occupied by the enemy. To the case of Rotterdam (Holland being neutral) it could have no application at all.

The Proclamation by section 3 accordingly lays down that "the destination of conditional contraband for the "use of the armed forces or a Government Department "of the enemy such may be inferred from any sufficient "evidence, and (in addition to the presumptions laid "down in section 34) shall be presumed to exist if the "goods are consigned to or for an agent of the enemy "State, or to or for a merchant or other person under "the control of the authorities of the enemy State." We have grave doubt whether it would be possible under this presumption to put a stop to noxious German imports viâ Holland, for though a naval officer may at his own risk seize a neutral vessel on any pretext, it by no means follows that a Prize Court will sustain his action. Our Prize Courts, we fancy, would only act on the above-mentioned presumption on the clearest evidence as to the status of the consignee, and this would be obtainable only through our own agents in Holland. "Any sufficient

evidence" is an extremely vague phrase, which the Prize Court will perhaps have an opportunity of interpreting in regard to the neutral vessels recently taken under suspicion of carrying petroleum and other articles of conditional contraband to Scandinavian ports for ultimate transport to Germany.

JURIST.

VIII.—CURRENT NOTES ON INTERNATIONAL LAW.

Prize Cases.

"NOW the Fleet's a Fleet again"—and the silver oar of the Admiralty presides once more over a Prize, as well as an Instance, jurisdiction. The only case so far decided of any particular importance has been that of *The Marie Glaeser*. In this case the true ground of the decision was that last mentioned in the President's judgment—namely, that those who navigate under the flag of an enemy identify themselves with that belligerent, and lay open to confiscation their property so navigating. It is of no consequence whether their interest is ownership or something less, such as mortgage: in this case, it was mortgage. Much learning was expended in discussing the extent to which an interest in ship or goods can be separated from the ownership and treated as hostile or neutral when the ship or goods are neutral or hostile respectively. The case of *The Tobago* shows conclusively that mere non-apparent liens on a belligerent ship may be disregarded by captors. But the question still remained arguable whether a definite right of property, apparent on the ship's papers, might not be in a different position. Lord Stowell's explicit distinction between the two cases of a mere claim, and a proprietary interest, provided the basis for an argument.

However cogent such an argument might be made in the case of cargo, or in the case of a neutral ship in which an enemy has an interest, the consideration above alluded to makes it irrelevant in the case of an enemy ship. The case of a neutral ship remains open. In *The Ariel* (11 Moo. P. C.), Dr. Lushington condemned a neutral ship in suspicious circumstances on account of a small outstanding vendor's lien; but the Privy Council restored it. The possibility of restoring the ship and confiscating the lien does not seem to have been seriously discussed. As regards cargo, both questions remain unsettled—alike of a neutral interest in enemy goods and of an enemy interest in neutral goods. It may be remarked, however, that if neutral and enemy interests are mixed up, it is usually difficult for the neutral to satisfy the Court of the *bonâ fides* of the neutral character. It is improbable that enemy goods can be protected by the fact of their being mortgaged, however formally, to a neutral. Certainly it could not be done *in transitu*.

The great majority of the cases brought into Court resulted in decrees of detention. Such decrees are unknown to the practice in prize, and it would have been much better if the matters had simply been adjourned generally. It may be a question whether, a decree having been definitively made, it can be superseded in future by another. If the Court were asked to proceed to condemnation, it might regard itself as *functu officio*. A prize must be brought to prompt trial—but the propriety of detention could then be pleaded as a reason for not immediately proceeding to sentence.

The reason assigned for detaining, instead of confiscating, the prizes is the existence of the Hague Convention (VI, of 1907), dealing with maritime warfare. This, by the way, is only operative where all the parties to the war are signatories; and in the present case some of them have made reservations with regard to the crucial clauses. Art. 1, declaring

that it is "desirable" that hostile ships should be allowed a period of grace to depart with their cargoes, and Art. 2, providing that if they are prevented by circumstances or by force from departing, they shall only be detained (or requisitioned) and not confiscated, appear to be generally accepted —but they seem to embody a mere recommendation. The view may be correct which treats the casual provision in Art. 2, substituting detention for confiscation, as applicable to all cases, and not merely to those in which the seizure is in defiance of a period of grace. In the writer's view, that is too serious a result to infer from a passing reference. Art. 2 is presumably based on the assumption that Art. 1 has been followed, and a period for departure allowed. If it had been intended to introduce so grave a change in the existing law as to abolish the right of capture of enemy vessels found in our ports altogether, it is surely to be supposed that the change would have been made at the head of an Article, if not in a separate one. Ships met at sea without knowledge of hostilities are protected by a different Article (3). Germany did not accede to this, so that German ships on the high seas lay open to confiscation. Austria, however, did accept the Article; so that, but for the condition that all the parties to the war must be parties to the stipulations of the Convention, Austrian ships might be protected by this clause. It is possible, however, that the Convention must be taken as a whole, and not clause by clause; if that is so, it would not apply at all, since different portions of it are accepted by different nations, parties to the war. In that event the Court has perhaps been mistaken in pronouncing for detention.

Luxemburg and Belgium.

Not long ago we discussed the position both of Luxemburg and Belgium in these pages. The plea of necessity as an excuse for the violation of their neutrality will not for a

moment hold water. For it was precisely in order that the necessities of belligerents should not be relieved by the use of their territories that these two countries were formally made neutral. It would have been very hard to arouse any enthusiasm in England for a merely anti-German war; or to scare the British people by attributing to the German Emperor the idiocy of Nietsche and Bernhardi. But the moment that Germany showed that her pledged word was of no consequence to her in comparison with her material interests, every inhabitant of these islands felt that they were in presence of a force inimical to every form of organised confidence and security. The peculiar circumstances of the invasion ought to have secured to the Belgians a very high measure of indulgence. Instead of that, the German policy of *kriegsraison* has been pushed to the utmost lengths: as to Luxemburg, its enforced state of unprotection has saved the population from massacre and, perhaps, from pillage, but the treatment of the heroic Grand Duchess has been infamous. Germany may well desire to establish a new code of ethics. For, judged by that of Plato, or Homer, or Asoka, not to speak of Dante or Goethe, she has demonstrated herself to be a tenth-rate State.

German War-Practice.

It was always known that the practice of the German troops towards an invaded population would be severe. The wars of the middle of the 19th century were in this respect mild. The Austro-French War of 1859, the Austro-Prussian War of 1866, the Swiss Cantonal Wars, the Crimean War, were marked by no excessive stress on the invaded populations. The American War of 1861-5 was scarred by only one disgrace—Sherman's devastation of the Shenandoah. The Franco-Prussian struggle of 1870

introduced a notable change. Strasburg Cathedral was damaged by bombardment. Bazeilles was burnt with some of its inhabitants. Franc-tireurs were slaughtered. All this was justified, then and subsequently, by the invocation of "the necessities of war," and of protecting the advancing troops. When, at the Brussels Conference of 1874, it was urged by the small States that the right of unorganised populations must be preserved, to rise *en masse* against disciplined armies, Germany was foremost in protesting against such an unprofessional attitude. Subsequent conferences at the Hague have whittled away the right almost to uselessness. We were certain, therefore, to find the Germans behaving in war with great license, and taking strong measures where they conceived their safety endangered. The question they propound is, Are such measures necessary? And, taking their own ground, it may at once be answered that they are not. The simple fact is that no other people has, in modern warfare, found it "necessary," for the protection of its armies, to strike terror into the invaded territory, to exact wholesale vicarious retribution for isolated acts, to destroy whole cities, to burn works of art. In this, as in so many other matters, the world has too readily listened to the Prussian exemplars of warfare. The present awful occurrences show us where such theorising leads one. On the whole question of Prussian war methods, the reader may care to consult an impartial authority in the Argentine statesman Alberdi, whose work, *The Crime of War*, was published in an English dress in 1912. He lays stress on the poisonous system of espionage, as characteristic, even more than arrogant severity, of the Prussian militarist.

T. Willing Balch and Arbitration.

The fortieth anniversary of the appearance in this magazine (Nov. 1874, p. 1026) of the late Mr. T. W. Balch's account

of the settlement of the *Alabama* question by amicable arbitration, as originally suggested by him, makes it a suitable occasion for glancing at the history and prospects of that institution. It cannot, one supposes, be doubtful that pacificists have attempted too much—that having found that arbitration would work, they too readily assumed that it would always work—and that they aimed at imposing upon the nations a rigid authority at the Hague which would be more deadly than any Prussian or Russian bureaucracy. The Hague Tribunal, as a thing sacrosanct in the eyes of all good pacificists, must surely now be no longer a tenable conception. It is valuable when neither party wants to fight, and both want an honourable means of escape from fighting. It will not prevent one nation from attacking another; as Italy attacked Turkey, and Austria Servia. It is more hopeful to consider such measures as Mr. Bryan's Commissions of Enquiry and Mr. Efremoff's College of Mediators. A somewhat similar proposal to the last has been propounded by the present writer. On any occasion of dispute it might be referred to a college representing the conscience of the civilised world, not to decide the dispute, but to say how it might properly be determined. The college would, in short, give the verdict of the community on the proper means of adjustment. It might well be composed of twelve members, chosen by the disputants. Each of the latter might prepare a separate list, placing the nations in order of preference, and the twelve highest on both lists would constitute the panel. The opinions of such an Areopagus on the plain question of what means of pacific settlement was appropriate could not be lightly disregarded. And if there could be coupled with this, a strong universal sentiment against one nation ever crossing the frontiers of another, a really practical step would have been taken towards permanent peace—a much more practical step than

[illegible] scheme of elaborate machinery [illegible] nations to lawyers.

Meanwhile, every honour must be paid to the pioneers of [illegible] settlement, such as Mr. Balch (a reprint of whose letters and articles has just been published at Philadelphia). Their idea is destined to triumph, though it may be long before the *vir pietate gravis* succeeds in interposing universally his "*mittite ambo hominem*"—for we cannot expect the arbitration idea to be victorious all at once. The issue in this magazine of Balch's proposition, subsequently realised at Geneva, will always form a landmark in the history of the world.

Sale of German Ships.

The proposal for the sale to United States owners of German liners at present in American waters appears to have fallen through. Although there now exists power to give foreign-built ships an American register, it seems unlikely that these vessels will be so adopted. It is scarcely possible that our Prize Courts would have recognised any such transfer. A *bonâ fide* sale to a neutral, even during war-time, is not impossible. But if it is attended with any reservation of interest or control to the enemy, it is disregarded. Much more, if it is effected for the purpose of preserving the enemy's trade connection for him, and if the result is that the ships, after sale, are employed in the same trade as they or their consorts were before the war.

Iron Ore as Contraband.

To place aircraft in the list of absolute contraband is probably unobjectionable, considering that military use is perhaps the chief purpose for which it can be employed. But to put crude ores (in defiance of the Declaration of

London) in the contraband list is most unfortunate. It opens the door for the declaration as contraband of almost anything that a belligerent finds convenient—including food. This might be most dangerous for ourselves. In any event, to treat iron ore—a substance of preponderatingly civil and innocent use—as contraband is calculated to injure us in the eyes of neutrals, and to nullify the good position which we had obtained in their eyes as the defenders of Belgian neutrality. It is true that ore is only regarded as "occasional" contraband. But that means little. Since the Court is at liberty (if it follows the Government's lead) to spell out an intention, wherever the goods are actually going, that they shall be ultimately delivered to "any person under the control of" the enemy government, the protection afforded to neutrals is quite illusory, and according to the new doctrine of the Declaration of London, they will lose their ship. It is not surprising that America, Sweden, and Holland have protested against this attempt to combine all the numerous features adverse to neutrals of the Declaration, with a reversion to the few doctrines against which that document gave them protection. The doctrine of continuous voyage is asserted. The doctrine of occasional contraband is asserted. The power to destroy neutral ships is asserted.

As to nickel, it may reasonably be regarded as in a less favourable position than iron, being an essential constituent in modern armour and ordnance, and perhaps of as overwhelmingly military connotation as sulphur. If we recall the doubt with which even the position of coal was discussed as lately as the early years of the present century, we shall realise how seriously the position of neutrals has been prejudiced during the last ten years. Lord Stowell, who never condemned rough timber, would have been amazed at such extremities. It is believed that Sir C. Spring Rice has promised the American President that

pre-emption will be substituted for confiscation; and that is certainly the least that can be offered.

Enemy Character.

It is possible that the Government are making a mistake in assuming that, for all commercial and financial purposes, an enemy resident in England is an Englishman. The criterion of enemy character in respect of trading with the enemy, and the criterion in respect of power to make valid contracts, are two entirely different things. "Trading" with the enemy is a technical expression, and does not properly include contracting with the enemy. It properly means the locomotive transit of goods to or from the hostile territory, and the only normal penalty is their confiscation. The government proclamations apparently denounce penalties on all commercial transactions with persons in Germany and Austria. On the other hand, they are dangerously lax with regard to Germans and Austrians here. These are apparently permitted by implication to carry on transactions of all kinds, and unless the Proclamation of 9 September 1914 can be cut down by reference to its professed object (which is to deal with "Trading with the Enemy," *i.e.*, primarily locomotive transport), its effect may be to enable Germans in England, or their agents, to compel British subjects to make payments to them, which sums they may at once remit by well-known and simple channels to Berlin. Nor can the concession of the British character to companies entirely or principally owned and operated by Germans be considered as in accordance with common sense. There is nothing sacred about a company. It is only a device for limiting the liability of a partnership. If the partners are enemies, calling them shareholders does not convert them into friends.

Sale of War Ships to Neutrals.

It is impossible to quarrel with the purchase by Turkey of war ships from Germany. She is at liberty to buy her navy where she likes provided the transaction is bona fide. The many cases in which purchases from an enemy in war time have been disregarded are all cases of merchant ships in which the vessel, after sale, was still carrying on the enemy's trade as before.

One can hardly accept the suggestion that the case of *The Minerva* is in any way applicable. There, the refugee man-of-war was taken up by the neutral sovereign (Count Bentinck of Oldenburg) to be used in trade, and probably in the enemy trade in which formerly she had been employed. In such cases as that of the *Goeben*, it is not the case that the enemy is relieved from the consequences of his vessel's predicament. That predicament results in the neutral obtaining an expensive ship extremely cheap.

Turkish Capitulations.

Little regret can be affected at the disappearance of the capitulations. True, they rested on treaty, and we should be the last to deny the binding obligation of treaty stipulations. But these particular engagements, entered into centuries ago as a matter of mutual convenience, have gathered round themselves such an accretion of customary encroachment, that they amount to the constitution of a very serious *imperium in imperio.* Their furthest extension took place in Morocco, where they patently sapped the independence of the kingdom. Natives were granted "protection" wholesale, and thus withdrawn from the national jurisdiction into that of the consul. Something of the same sort took place in Siam, and nearly made the country a French colony. Japan took the earliest opportunity of repudiation; and we

[illegible] that Turkey has at last got rid of a [illegible] source of irritation. The letter of the treaties [illegible] way supports the vast structure which custom has [illegible] upon it. It gives little more than a right to the consul to attend proceedings. Difficulties of language, and the *far niente* disposition of Turkish officials, allowed the procedure to slip into trials before the consul alone. The whole practice was challenged and examined in the *Joris Case*, where a Belgian shot at the Sultan in Constantinople. It was apparent that wars and the influx of fresh nations had left matters pretty much as they had been. Privileges were granted to new comers and to late enemies by reference to existing ancient treaties. It may probably be quite possible to justify the Turkish action by insisting upon the letter of the treaties, and by ruthlessly clearing away the mass of customary practice which has gone so far beyond what was expressly stipulated. Incidentally, this would render it possible for Egypt also, in a large measure, to emancipate itself from the mixed tribunals, which rest entirely on the fiction that Egypt is incorporated with the Ottoman dominions.

Internment.

The survivors of the *Cap Trafalgar* have been interned in Argentina. The survivors of the *Aboukir* have not been interned in Holland. In the former case, they were brought in by a belligerent vessel. In the latter case, they were landed by neutral ships. Is this a fair ground of distinction?

Internment is a very modern thing, as applied to ships. In fact, it is a very modern thing altogether. It has for some fifty years past been recognized that an organized military force is out of place in neutral territory, and that a victorious enemy can hardly be expected to refrain from attacking it. It would probably have been sufficient to enact that such a force must be dispersed, and perhaps

disarmed. But at the Hague Conference of 1899, it was provided that it must be imprisoned by the neutral: otherwise it is argued, the enemy will certainly pursue it into the neutral country with a view to annihilating it. It is possible to criticise this view, as too favourable to the belligerent. It gives him, at the expense of the neutral—(we are not speaking of financial expense)—all the advantages of a crushingly successful pursuit. The fugitives are friends in the neutral country. They may well be dispersed, but it is going too far to shut them up, and charge their country with the cost of their keep.

However, that course was adopted. And in 1907, it was extended to the sea. A war ship, in the first place, taking refuge in a friendly port, and not leaving as soon as repairs are accomplished (subject to any special provision to the contrary in the local law), is to be "interned." This is a further advance upon the military provisions; for a war ship, unlike an army, is in a normal and usual position in friendly ports (*vide* Arts. 12, 13, 24 of No. 13 of 1907). But even in 1899 (Art. 10 of No. 3; Art. 15 of No. 10 of 1907) it had been provided that, "shipwrecked, wounded or invalid persons" (evidently belligerent combatant persons are meant), who are landed at a neutral port by consent of the territorial authority, must be put under surveillance by the neutral State, so as not to be able to participate further in the war. It will be observed that nothing is said as to their being rescued after any engagement. A typhoid patient, or the victim of a cyclone or a stranding, is equally within the rule with a defeated armada. Since vessels in distress have always been peculiarly protected (or have even been restored, by somewhat quixotic enemies), this provision is particularly gratuitous and objectionable, though it was extended to neutral war ships as well as territory by Art. 13 of No. 10 of 1907. It is only proper to cut

it down as much as possible. Thus the word "landed" (*débarqués*) may exclude the case of shipwrecked men who come ashore by swimming, or by escape from a wreck. And even where there is a regular "landing" from a ship, it will be noted that the Article rather implies that the landing shall be from a ship of his own side. If he is picked up by a neutral vessel, it is agreed that the situation contemplated by the Article does not arise. It is on this ground that the Dutch released the British survivors. They were, in the first place, after their shipwreck, taken on board a neutral vessel, which was not a war ship (so that the internment provisions of Art. 13 of No. 10 of 1907 did not apply). Once in that position, the Article became inapplicable, though a German war ship might have demanded their surrender *en route* under Art. 12 of No. 10 of 1907. The subsequent landing was simply a landing of men already under neutral protection in a neutral port. It is difficult to appreciate the force of the logic, though we gratefully recognise the humanity of the argument.

Reservists on Neutral Vessels.

The mere carriage of military persons has never, we believe, been made an occasion for interference with neutral vessels. This, in fact, was the great strength of the British case in dealing with the stoppage of the *Trent*. It is not un-neutral service to carry civil or military servants for hire. Nor are such persons contraband. The uses of a man as a human being preponderate over his utility as a soldier or an ambassador. The cases in which it has been held un-neutral service are (including the Japanese case of the *Nigretia*) all cases in which the ship was temporarily under hostile control (though fraud or force may have been exercised on the master or owner). It is, of course, possible that the proportion of reservists might be so high, and

so notorious, that the presumption that the voyage was organized by the enemy might be too strong to be [illegible] proved, and for any considerable movement of troops to take place the proportion must be high. The Declaration of London, however, goes considerably beyond the law. By Art. 47, "every person included, '*incorporés*,' ['embodied,' the current translation, has a connotation in English which is a trifle misleading] in the armed forces of the enemy, who is found on board a neutral merchantman, may be taken prisoner, even in cases where there is no ground for capturing the ship." This provision has often been criticized as un-English, obliging a neutral to give up, for instance, rescued men whose fate may be exceedingly uncertain, once they go over the ship's side. But, if we can take advantage of this provision, it certainly gives us all we want in the particular matter of arresting reservists. The United States have ratified the Declaration, but we cannot expect any nation to allow it to be adopted in an altered form, and to admit certain of its provisions to be law whilst others are discarded.

IX.—NOTES ON RECENT CASES (ENGLISH).

THE Law Reports for the last three months are, as might be expected, very scanty in bulk: they fill, in fact, less than 250 pages. Few of the cases reported are of any considerable or even general interest. Perhaps the most noticeable in this respect is *In re Harris, Davis* v. *Harris* (L. R. [1914], 2 Ch. 395). In that case two questions arose. The first was as to an executor's right to retain a simple contract debt due to him, as against specialty debts owed by the testator to other creditors. Hinde Palmer's Act 1869 abolished the preference theretofore enjoyed by specialty creditors. The English Courts, however, in interpreting this statute, held that it did not

abolish the distinction between specialty and simple contract debts, but merely declared that they should be paid *pari passu*. The Court's objection to allowing that the distinction was abolished was due to its reluctance to improve the already privileged position of the Crown, by giving its simple contract debts a preference over the specialty debts of other creditors (as to the practice see *In re Bentinck*, L. R. [1897], 1 Ch. 673); or to extend the executor's rights of preference and retainer. The Irish Courts, however, took a different view, and held that the effect of Hinde Palmer's Act was to abolish the distinction between specialty and simple contract debts. This view was ultimately adopted also by the Court of Appeal in England in *In re Samson*, (L. R. [1906], 2 Ch. 584), which was a case of an executor preferring a simple contract debt to a specialty debt, and the Court, in deciding that he was entitled to do this, expressly refused to consider whether the rule extended to the right of an executor to retain his own debt. But clearly the principle that Hinde Palmer's Act abolished the distinction between specialty and simple contract debts, could not logically be limited so as to exclude the right to retain. The Irish Courts held that an executor could retain his own simple contract debt against another creditor's specialty debt (*Olpherts* v. *Coryton* [1913], 1 Ir. R. 211), and now in *In re Harris* (*supra*) Sargant, J., has adopted the same view.

The second point decided in *In re Harris* (*supra*) was scarcely arguable. The plaintiff executor who wished to prefer, claimed as a trustee of a settlement of which the testator had been a trustee, and in respect of a debt arising in equity against the testator owing to a breach of trust committed by him. The plaintiff was not a trustee at the testator's death, but was subsequently appointed, and it was contended that as executor he could retain only as to debts

due to him at the testator's death. The point was already decided to the contrary in *In re Barrett* (L. R. [1889], 43 Ch. D. 70); and that decision has never been questioned. Indeed, it was only very recently practically followed, when in *In re Jones* (L. R. [1914], 1 Ch. 742), it was held, that an executor who at the testator's death was not a creditor of the testator, but who afterwards paid some of the testator's debts out of his own money, could, when assets came to his hands, retain out of them for the repayment of the money advanced.

Another interesting decision is *Lord Ashburton* v. *Noctin* (L. R. [1914], 2 Ch. 211). That case turned upon the point as to what steps are now necessary to make a judgment debt a charge upon the judgment debtor's land. This law depends on four separate statutes. First, the Judgments Act 1838 simply provided that judgment debts should be a charge on the judgment debtor's interests in land, whether legal or equitable. Then the Judgments Act 1864 provided that judgments should not affect the land till it was actually delivered in execution. Later, the Land Charges Registration and Searches Act 1888 enacted that writs and orders "affecting land issued or made by any Court for the purpose of enforcing a judgment . . . . and any order appointing a receiver or sequestrator of land," might be registered at the Land Registry. Lastly, the Land Charges Act 1900 repealed the provisions of the Judgments Act 1864, as to the necessity of the land being actually delivered in execution, and enacted that a judgment shall not operate as a charge "unless or until a writ or order for the purpose of enforcing it is registered" under the Land Charges Registration and Searches Act 1888.

Now a writ of elegit is the ordinary way of enforcing a judgment against land; but such a writ can have no effect

where the judgment debtor has only an equitable interest —say for instance, where the land is mortgaged. Accordingly, under the practice before the Land Charges Act 1900, it was held, that where the debtor's interest was equitable, no order to enforce the judgment had been made till a receiver had been appointed by the Court; since till then there was no order affecting the land within the Judgments Act 1864. That Act, as far as this point is concerned, is repealed by the Land Charges Act 1900, which moreover says nothing about judgments affecting land. Is then a writ of elegit a writ for enforcing a judgment within the Land Charges Act 1900, so that the registration of it will be sufficient to give the judgment creditor a charge on the debtor's equitable estate in land? The Court held it was not; and that the only order which, when registered, created a charge on a judgment debtor's equitable estate, was an order for the appointment of a receiver.

The case of *Millbourn* v. *Lyons* (L. R. [1914], 1 Ch. 34), which we were somewhat disposed to doubt (see *Law Magazine and Review*, Vol. XXXIX, p. 357), has now come before the Court of Appeal and been affirmed (L. R. [1914], 2 Ch. 231). The judgments there delivered have convinced us that our doubt was unfounded. The question was as regards a restrictive covenant which by the contract of sale was reserved for the benefit of the vendor's other neighbouring property. When, however, the conveyance was actually executed, the vendor had sold the property in question. It was contended that the buyers of this property should be entitled to the benefits of the covenants, because the contract gave the purchaser an equitable estate subject to equitable easements, and these existed after the contract had been completed by conveyance. As the Court pointed out, the effect of this view, if adopted, would be to make the contract of sale a part of the title, and to leave the rights

of the parties dependent on both instruments, [illegible] was certainly not what *Broomfield* v. *Williams* (L. R. [illegible] 1 Ch. 602) decided, when the Court of Appeal held that it was, at the time, not of conveyance but of contract, that the rights of the parties were determined. All that [illegible] was that, in construing the terms of the conveyance, the Court, in order to determine the meaning of the parties, should look at the state of things existing when the transaction was initiated, not at the time when it was completed.

A rather amusing case is that of *English* v. *Cliff* (L. R. [1914], 376), where it was actually contended that a limitation was void from remoteness because it was to arise "at the expiration of twenty-one years" from the execution of the instrument creating it. This contention was based on the ground that, since the limitation was only to arise "at the expiration of twenty-one years," it was not good within the rule against perpetuities which requires the limitation to arise "within" twenty-one years. The Court summarily disposed of this argument by holding that the expiration of the twenty-one years and the rising of the following limitation were simultaneous events, therefore the latter could not be said to be outside the period allowed by the rule.

J. A. S.

It was quite certain that contentions would arise as to the interpretation of sect. 46 and sect. 2 of the Finance Acts of 1910 and 1912 respectively. Put very briefly, the Act of 1910 aimed at "tied" houses, and entitled a licence holder to recover, from persons from whom he was bound to purchase intoxicating liquors, a part of any increased duty payable for licence, proportionate to any increased rent, or to any increased prices for liquor supply, charged

to him by reason of the monopoly." The Act of 1912 aimed at "free" houses held under a lease made before the Act of 1910, and entitled the lessee to recover from the grantor a part of the increased licence duty under the Act of 1910, proportionate to any increased rent or premium in respect of the premises being let as licensed premises. In *Watney, Combe, Reid & Co.* v. *Berners* (L. R. [1914], 3 K. B. 288), the plaintiffs obtained, at a rent of £150 a year, a lease of a public-house already licensed but "free," and sublet it as a "tied" house at practically the same rent, they themselves paying the licence duty. They sought under sect. 2 of the 1912 Act to bring in the grantor as a contributor towards the increased licence duty, on the ground that the yearly rental of the house, without a licence, would be only £90. The question was, as Kennedy, L.J., said, not an easy one to solve, as was shown by the differences of opinion delivered. The Divisional Court, reversing the County Court judgment, had decided in favour of the defendant; and now on the appeal Lord Sumner differed from his colleagues. Some of the points of the decision which was in favour of the defendants were that, by the terms of sect. 2 of the Act of 1912, a lessee would include a lessee who is not the occupying tenant but has sublet. This was so far in favour of the plaintiff. But a licence holder is the only person upon whom the 1910 Act imposes the increase of duty, and to him it is that relief is afforded under both Acts. The lessee under sect. 2 of the 1912 Act is the person entitled to relief by a reduction of rent due from him to his lessor; and therefore the lessee is the licence-holder lessee. The contrary view would create a continuous chain of liability to contribute towards the increase of duty, extending from the licence holder, through sub-lessees, to the grantor both included. But a decision of the House of Lords will be required before all doubt is dissipated.

Negligence on the part of a banker may deprive him of the protection of sect. 82 of the Bills of Exchange Act. But the protection so lost may be restored if negligence is subsequently displayed by the claimant of a remedy against him. *Morrison* v. *London & County & Westminster Bank* (L. R. [1914], 3 K. B. 356), is a useful illustration of this. The facts of the case are too lengthy for detailed notice, the report covering thirty pages. The main points, however, are that the plaintiff had directed his bankers, the National Provincial, to honour cheques signed per pro. by his manager; and that the manager had paid to his own credit in his private account at the defendant bank cheques so signed. As the defendants had become holders of cheques which had never been the property of their customer, they were *primâ facie* liable to the plaintiff for conversion, unless protected by sect. 82 of the Act. It was held that the form and destination of the cheques should, in the early instances, have put the defendants on enquiry, and as they had failed to question the authority, they were deprived of the defence of the section. The result was, that, so far, the law was on the side of the plaintiff. But his hopeful prospect was overcast by a heavy cloud. The evidence had disclosed circumstances which were quite remarkable. The manager opened his account with the defendants in 1905. Two years later he began paying into his credit certain of the misappropriated cheques. Some irregularities induced the plaintiff to have his books examined by independent accountants, who reported to him in September, 1909. It is clear, therefore, that at that date he had knowledge of his manager's misdoings. In November, 1909, a new agreement was made between him and the manager which contained no restraint on the latter beyond a mild stipulation that he should not thereafter pursue fortune by the precarious paths of betting, gambling, or speculation. But he continued his malpractices

till 1912. And the plaintiff now sought damages from the defendants for the entire loss. Not only had he the balance sheets prepared by the accountant, but he had at all times power of reference to his own pass-book and to the returned cheques. The accumulated weight of these facts irresistibly established ratification. Whatever negligence there may have been on the part of the defendants at the commencement of the irregularity, was expunged by the long continuance of payments into the manager's account by cheques signed by procuration.

There is a popular idea that a right of way over private ground is acquired by uninterrupted user by the public for an uncertain number of years. Some decisions have favoured this view, and, in cases where the majority of a Court have rejected the view, dissenting judgments have strengthened the popular belief. In *Folkestone Corporation* v. *Brockman* (A. C. [1914], 338), the House of Lords have delivered a judgment of the majority which may remove the misconception as regards England. In Scotland rules affecting the question are different. A merely unauthorised use by the public of a way over private ground, even though the use is unrestricted or unchecked, confers no public right. Even long use is no more than evidence for what it is worth as an inference of dedication. Length of user and the *locus in quo* may give support to the inference. But dedication is the only valid basis of such a right, and since the Highway Act of 1835 dedication has to be confirmed by certain formalities. So that for a right to be presumed from user, the use must be claimed as having arisen earlier than that year.

Another highway case, but of a different kind, is *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* (L. R. [1914], 3 K. B. 1); and of some

importance as affecting road traffic at the present day. The defendants, as owners of a canal, were bound under the terms of their authorising Act to build and maintain certain bridges; and they contended now that neither at Common law nor otherwise are they obliged to maintain the roads over their bridges at a higher standard than was necessary for the traffic which used them in 1791, when the bridges were built. But the Court decided that the measure of the defendants' liability was the same as that of the road authority on either side of their bridges. A road authority has, of course, to maintain its highways in an up-to-date condition, and in that condition the authority concerned here would have had to sustain the unbroken road if it had not been severed for the benefit of the canal promoters. But the defendants in consideration of the right to make the canal had assumed that duty, in some degree, over the bridge surfaces. If their contention had succeeded, there would have been two standards of repair along a continuous highway. Over the larger part the requirements of the existing traffic would have been met; but over a short portion, the continuity of efficiency would have waned to whatever might have been sufficient a century ago. Or else the highway authority would have had at their own charge to supplement the antiquated standard of the canal owners.

When four years ago *Rex* v. *Norton* (L. R. [1910], 2 K. B. 496) was decided, it was questioned in some quarters whether the law was quite accurately expressed in what seemed to be the ruling in that case, viz., that a statement made against an accused and in his presence before he was charged was not relevant, and should be disregarded at his trial unless the truth of the statement had been admitted by him. By this decision the Court of Criminal Appeal seems to have been bound when *Rex* v. *Christie* was before them; and they

quashed a conviction mainly because the prisoner had denied the charge when identified and accused by a boy whom he was alleged to have assaulted. The boy at the trial again identified the prisoner, but was not questioned about the previous identification. Evidence of both the identification and the statement was, however, given by a policeman and by the boy's mother. The case was carried to the Appeal Court (L. R. [1914], A. C. 545) "to obtain a final pronouncement of the law on a matter of great importance in the daily administration of criminal law." The pronouncement is, that there is a rule of law "that a statement made in the presence of an accused is not evidence against him of the facts, save so far as he accepts the statement by word or demeanour." "But there is no rule of law that a particular form of response, whether positive or negative, is such that it cannot in some cases have an evidential value." For instance, "His denial may be in such a manner that the jury would disbelieve him." But practically, the pronouncement leaves matters much as they were, for the caution is given that a judge would in most cases be acting with the best traditions of our criminal procedure if he exercised his influence over the prosecution, to prevent such evidence being given where it would be of little or no evidential value.

T. J. B.

SCOTCH CASES.

In *William Baird & Co. Ltd.* v. *The Ancient Order of Foresters* ([1914], 2 S. L. T. 206), a workman and his employer had come to an agreement under which the workman accepted a lump sum in satisfaction of a claim for compensation under the Workmen's Compensation Act. A memorandum of the agreement was sent to the sheriff-clerk (the Scottish official corresponding to the registrar of the

County Court) for registration. The approved society with which the workman was insured under the National Insurance Act desired to intervene, in order to maintain that the memorandum of the agreement ought not to be registered, in respect that the lump sum agreed on was inadequate. Its pecuniary interest to do so was obvious, because under the National Insurance Act, the amount of the sickness or disablement benefit payable by the society to the workman would largely depend on the weekly value of the lump sum—the larger the lump sum, the less would be the amount of sickness or disablement benefit. But the right of the society to be heard depended on its being able to show that it was a party interested in the sense of paragraph 9 of the second schedule to the Workmen's Compensation Act. In the Court of Session the actual decision turned largely on questions of Scottish procedure, and the question whether the approved society was a "party interested" was not decided. The Court held (1) that the approved society was entitled to lay information on the question of adequacy before the sheriff-clerk, and (2) that the sheriff was entitled to hear the approved society, in order to enable him to perform his statutory duty of deciding whether the memorandum of agreement should or should not be registered. The Lord President expressed his opinion "as then advised," that the approved society was a party interested. Lord Johnston was of a contrary opinion, while Lord Skerrington seems to have been inclined to agree with the Lord President. The case should be compared with the English case of *Bonney* v. *Joshua Hoyle & Sons, Ltd.* (L. R. [1914], 2 K. B. 257). There the Court of Appeal, while recognising that the approved society "like any other busybody" might lay information before the registrar of the County Court, held that it was not a "party interested" in the sense of paragraph 9, and had no *locus standi* to be heard on the question of the adequacy of the lump sum payment.

The view that the County Court Judge had a discretion in the matter was not suggested either in the arguments or in the judgments.

One of the most important Scots decisions of recent years is *A. B.* v. *C. B.* ([1914], 2 S. L. T. 107). It was an action for nullity of marriage, at the instance of a husband, on the ground that the wife was pregnant by another man at the date of the marriage. The facts found by the Lord Ordinary were, that the marriage took place on 6th September, 1913; that at that date, the wife was pregnant, by another man, of a child which was subsequently born and was alive at the date of the trial; that she concealed the pregnancy from the pursuer; and that if he had known of her condition he would not have married her. The First Division (to whom the case was reported by the Lord Ordinary) drew the inference that the wife knew, or at least suspected, her condition at the date of the marriage, and did not believe that the husband had any knowledge of it. On these facts, the Court held, that the husband was entitled to have the marriage annulled. This decision is in direct conflict with the law of England as laid down by Sir Francis Jeune, P., in *Moss* v. *Moss* (L. R. [1897], P. 263). The ground of the Scots judgment is fraudulent concealment—that a duty of disclosure lay on the wife, and that she acted fraudulently towards the husband by not informing him that she knew or suspected that she was pregnant. The decision is certainly in accordance with natural justice—the wife had been guilty of a gross fraud and the hardship to the husband is apparent. But it is not easy to discover a legal ground on which the decision can be rested without making a serious inroad on the institution of marriage. Logically, it is extremely difficult to give relief to the husband in the case under consideration, and to refuse it in the case where the wife has concealed ante-nuptial unchastity; or

in the case where she has concealed the fact that she has given birth to an illegitimate child. It is not easy to say that it is immaterial to the validity of the marriage that the wife has been unchaste, and even that she has become pregnant by that unchastity, but that it is material if the pregnancy has continued to the date of the marriage. There is no other case in which any mistake short of a mistake as to the identity of the person married has been held to invalidate a marriage. It rather looks as if a legal principle had been given up in deference to considerations of hardship. Nevertheless, even those whose legal consciences would not have allowed them to concur in the judgment will not regret the result arrived at.

Section 142 of the Companies Act was under consideration in the case of *Hill* v. *Black* ([1914], 2 S. L. T. 123). The section enacts that where a winding-up order has been made no action shall be proceeded with or commenced against the company without leave of the Court. The pursuer without obtaining leave brought an action in which he called as defenders (1) the company, (2) the liquidator, (3) and (4) trustees for two different classes of debenture-holders. Neither the company nor the liquidator lodged defences, and the only defenders who appeared were the trustees for one of the classes of debenture-holders, and they maintained that the action was barred by the provision of section 142. The Court held that the section could be pleaded only by the company or the liquidator, and could not be pleaded by the trustees for the debenture-holders, and accordingly the action was allowed to proceed. Lord Dundas' opinion suggests that if the company or the liquidator had taken the plea, it would have been competent to them to waive it.

In *Nasmyth's Trs.* v. *The National Society for the Prevention of Cruelty to Children* ([1914], 2 S. L. T. 146), the testator left a legacy of £500 to "the National Society for the Prevention of Cruelty to Children." The legacy was claimed by two claimants, (1) the National Society for the Prevention of Cruelty to Children, incorporated by Royal Charter and having its central office in London, and (2) the Scottish National Society for the Prevention of Cruelty to Children. Proof was allowed, and the evidence showed that the testator was a Scotsman, that all his interests were in Scotland, that he rarely visited England, and that he knew of the existence of the Scottish Society. It was not proved that he knew of the existence of the London Society. All the other objects of his bounty were Scotch. The Second Division gave judgment for the Scottish Society, being largely influenced by the consideration that a Scotsman would naturally speak of the Scottish Society as the National Society. This judgment was reversed by the House of Lords. It is difficult to resist the impression that the money did not go to the Society which the testator intended to benefit. But the name used in the will was an accurate description of the London Society and was not an accurate description of the Scottish Society. This being so, the House held that there was a strong presumption against the Society which was not accurately named, and that the evidence in the case was quite insufficient to overcome the presumption. It was argued that when once a person was accurately named in a will any further inquiry was forbidden in regard to the person who was to take the benefit. The House did not find it necessary either to affirm or to reject this proposition, but the judgments of Earl Loreburn and Lord Dunedin are unfavourable to it. The decision is a salutary one, as it drives home the lesson that Courts ought not to depart

from the language of the will in deference to conjectures more or less plausible as to what the testator may be supposed to have intended.

A petition by a lady for access to her pupil child was the bone of contention in *Westergaard* v. *Westergaard* ([1914], 2 S. L. T. 167). The petitioner and the respondent were domiciled in Denmark, but at the time of presenting the petition they were both resident in Scotland. They had been married in Denmark, but their marriage was dissolved by a Royal Warrant of the King of Denmark, under which the custody of the child of the marriage was given to the respondent. The Second Division held that they had no jurisdiction to entertain the petition. They had no power to review what had been judicially done in Denmark. If the Danish judgment was not final, application should be made to the Danish Court to have it varied. If the Danish judgment were final, no foreign Court could have any right to intervene. The decision does not, however, conclude the case where the application is presented in the interests of the child. In that case the Court would have power to intervene, in order to prevent the child from being injured.

In *John Milligan & Co. Ltd.* v. *Ayr Harbour Trustees* ([1914], 2 S. L. T. 82) the pursuers were shipowners in Ireland, and one of their ships, the *Eveleen*, arrived at Ayr for the purpose of loading coals. Owing to a trade dispute the labourers at Ayr Harbour refused to load the *Eveleen*. The pursuers tendered payment of the harbour dues and offered to provide labour for the loading of their ship, but the Ayr Harbour Trustees refused to allow them to import labour into the harbour. In consequence, the pursuer's ship was delayed, and the pursuers sued the harbour

trustees for damages for detention. The Lord Ordinary gave judgment for the pursuers. He held that, under the Harbour Docks and Piers Clauses Act 1847, the defenders were bound to supply labour to work the cranes, and if their ordinary staff refused to do the work, to replace them with employees who would do it; that the defenders were in breach of this duty, and that there was nothing in the circumstances which excused the non-performance. The case was a hard one for the defenders, for the Lord Ordinary held it proved that if the pursuers had been allowed to import labour, two consequences would probably have followed:—(1) The dock labourers would have used violence to the imported labourers, and possibly to the defenders' property; and (2) a general strike would have taken place at the harbour, with consequent detention of the other ships that were loading there. It is difficult to see how the defenders could have acted otherwise than they did, but they nevertheless failed to perform their statutory duty to the pursuers. If it had been impossible to perform the statutory duty they might have been excused, but although performance was difficult and inconvenient it was not impossible.

Lord Hunter's decision in *Gibson* v. *Fotheringham* (which was referred to in the August number of this review) has been affirmed by the Second Division ([1914], 2 S. L. T. 78). The case related to an agricultural reference to settle claims arising on the expiry of a lease, and it shows very clearly that in references of this kind the Court will be slow to interfere with the arbiter's decision on account of mere irregularities of procedure.

J. S. M.

IRISH CASES.

In *Sheane* v. *Fetherstonhaugh* ([1914], 1 Ir. R. 268), we have a useful reminder of a qualification which must be be put upon the well-known rule, that "an order of sale rightfully made by the Court causes an equitable conversion from the date of the order"—see, for instance, *In re Dodson* ([1908], 2 Ch. 638). That qualification arises from the broad principle that the act of the Court will not interfere with the rights of individuals further than is strictly necessary. In the present case the Land Judge had made an absolute order, on the petition of an incumbrancer, for the sale of realty to discharge incumbrances. This was held to operate only as an order for the sale of so much of the realty as was required to discharge the incumbrances; a residue *which was unsold* was held still to devolve as realty. "So soon as sufficient is sold as is necessary, the absolute order is dead. There never has been an absolute order for the sale of *all*, but only of an undetermined part" of the property. The case is distinguishable from *In re Stinson's Estate* ([1910], 1 Ir. R. 13), where, in pursuance of a similar order, more of the realty had been *actually sold* than was necessary to pay off incumbrances, and the Court held that neither heir-at-law nor next-of-kin had any equity to re-convert the residue so sold, as both were volunteers; it must devolve according to its actual condition; see *Burgess* v. *Booth* ([1908], 2 Ch. 648).

A neat illustration of the principles of marshalling may be noted (*In re Archer's Estate* [1914], 1 Ir. R. 285) as "a student's case." There were two funds, which may be called x and y. A. had a first charge upon both; B. had a second charge on y only. A. subsequently took a further

charge on x and y; after that, a third person C. acquired a charge on x only. Each had notice of all the prior charges. If A.'s first charge had been paid rateably out of both the funds, the residue of y would be insufficient to pay B.'s second charge in full. It was held that B. was entitled to marshal A.'s first charge, and to have so much of it paid out of x as would leave enough of y to pay B.'s second charge in full, even though the effect of doing so would prejudice C.'s puisne charge on x. "What was the right or equity of B. at the time A. took his second mortgage? He clearly had a right to marshal A.'s first mortgage, and the mortgagor could not create a further charge on x so as to prejudice that right. Even after A. got his second charge, B. could at any time have redeemed A.'s first charge alone, and claimed an assignment of both securities; and A., by virtue of his second charge, would be entitled to redeem B., but on the terms of paying in full, not only B.'s own charge but the amount B. had paid for the redemption of the first mortgage. In the same way, the mortgagor could not, by a subsequent mortgage to C., affect or prejudice the then existing rights of A. and B., of which C. had notice." Probably if C. had not had notice, the ordinary principle would have applied, that marshalling of securities between creditors is not allowed to the prejudice of a third person; see *Flint* v. *Howard* ([1893], 2 Ch. 54).

The Irish law as to fraudulent preference in bankruptcy, under sect. 53 of the Bankruptcy (Ireland) Amendment Act 1872, is virtually the same as that in England under sect. 48 of the Bankruptcy Act 1883, substantially re-enacted in the Bankruptcy Act 1914. Although cases under these sections must be very largely questions of fact, *In re Oliver* ([1914], 2 Ir. R. 356) may be mentioned as an example of a

transaction at first sight doubtful, but proving quite valid. The bankrupt had acted as agent in Ireland for the sale of cattle on behalf of W. who lived in England. On January 30th, the bankrupt sent to W. in England a cheque for the proceeds of certain sales. W. did not cash this cheque, and on February 3rd came over to Ireland, leaving the cheque behind him in England. On February 4th, the bankrupt came to W. and told W. of his insolvency; and at W.'s request, the bankrupt then gave him another cheque for the same amount and bearing the same date as the cheque of January 30th, which cheque W. immediately cashed. Earlier that day, the bankrupt had instructed his solicitor to file a petition for an arrangement with his creditors under the control of the Court; this petition was filed on the same day and the protection of the Court obtained, but the arrangement was subsequently turned into bankruptcy. It was held by the Court of Appeal that the giving of the second cheque did not amount to a fraudulent preference of W. The burden of proof is on the assignees (the Irish equivalent of trustees in bankruptcy) to show that a transaction is a preference, and that it is fraudulent. Merely showing that the bankrupt had knowledge of his insolvency at the time of the transaction, is not of itself enough to discharge this burden, or to shift the *onus* of proof. They must establish that the "dominant motive" of the bankrupt was to prefer this particular creditor. Difficult as speculations about a man's motives may be, there seemed in the present case sufficient indications to negative a suspicion of fraud. Apparently the bankrupt's intention was to do effectively what would have been already effectively done on January 30th if W. had been prompt in cashing his cheque; and the transaction seemed to proceed on the view that the money represented by the cheque, which was always W.'s money, and in respect of which the bankrupt stood in a fiduciary relation to him,

should be made his as from January 30th. On this view, the observation of Vaughan Williams, L. J., in *In re Lake* ([1901], 1 K. B. 710), becomes important: "If a payment made by a man on the eve of his bankruptcy to a particular creditor is made in order to repair a breach of trust on the part of the debtor, the presumption is that the payment was made, not with an intention to prefer that creditor, but from a sense of duty."

The issues in *Hunter* v. *Coleman* ([1914], 2 Ir. R. 372)—the action brought to test the validity of the proclamation restricting the importation of arms into Ireland—have of course passed under the eclipse which has covered so many other questions that were important, before the war. If the case does proceed as it was meant to proceed, it can hardly stop short of the House of Lords, so that detailed comment upon it is unnecessary at present. It need only be said that, so far, a majority of a Divisional Court has held that, under sect. 43 of the Customs Consolidation Act 1876, a proclamation is not invalid merely because it limits an area within the United Kingdom into which the importation of arms is prohibited.

J. S. B.

Reviews.

[SHORT NOTICES DO NOT PRECLUDE REVIEWS AT GREATER LENGTH IN SUBSEQUENT ISSUES.]

Year Books of Edward II, Vol. VI, 4 Edward II, A.D. 1310—1311. Edited for the Selden Society by G. J. TURNER. London: Bernard Quaritch. 1914.

It is now seven years since the preceding volume of this series of the Year Books appeared—the last work of the late Professor Maitland—under the editorship of Mr. Turner. The publication of the present volume, which contains all the reports of Hilary term, and all save a few of those of Easter term (4 Edw. II), has been delayed, owing to the prolonged research necessitated for identifying a large number of these reports with versions in other manuscripts, or with cases on the records of the Court, and thus determining their date. In the preparation of the text two new manuscripts have been used, one recently purchased by the British Museum and the other now in the University Library at Cambridge. The former called Y., which contains a considerable number of reports of the first three years of the reign not printed here, was unknown to Professor Maitland when he published his first volume. The Editor in this volume has been more lavish with variant readings, in the hope that they may help to solve some of the problems of the origin and purpose of the Year Books. In his scholarly introduction, Mr. Turner discusses at considerable length some of these problems. He warns us that Maitland's opinion that they were the product of private enterprise, "student's note-books and nothing more," referred only to the earliest of them, and that Maitland refused to speak of an age he had not observed. The time has now come, declares Mr. Turner, when an attempt should be made to study the origin of the Year Books in the light of this later history. This he proceeds to do by examining the statements of Plowden and Coke, relating to the four official reporters and to the appointment, by James I, under the advice of Bacon, of Edward Writington and Thomas Hetley, barristers of Gray's Inn, as reporters in the Courts at Westminster at a salary of £100 a year apiece. In view of this and other evidence, Mr. Turner suggests that, although the earlier Year Books of Edward I may

have originated from student's note-books, those commencing with Edward II, two of which are preceded by the *Novae Narrationes*, an obvious work of instruction, were produced under the direction of the Readers to the Inns of Court. As these Readers became negligent, the judges or the King appointed the four said reporters to perform the duties the Readers were neglecting. This suggestion is certainly plausible. The four Lent Readers for one-half of the year and the four Autumn Readers for the others, correspond in numbers with "the four discreet and learned professors of the law," said by Coke to have been appointed by the King as reporters. With Mr. Pike's theory that the Year Books were the work of the more important clerks of the Common Bench, Mr. Turner cannot agree. It is, he thinks, opposed to what evidence we have. In the discussion on the *Abridgements* of the Year Books, Mr. Turner makes the interesting suggestions that Statham's *Abridgement*—the earliest finished law book—was compiled by members of Lincoln's Inn under the direction of Nicholas Statham, when Lent Reader in 1471. If this view can be supported, it lends additional weight to his theory of the origin of the Year Books. The remainder of the Introduction is concerned with a description of the twenty-four manuscripts, and in the preparation of the text and of their owners, and with an account of the relations of the manuscripts to one another. A new departure in the Index of Persons is the addition of Christian names. An Index of Places is also new. The Table of Cases is exceptionally full. There is no falling off in this volume from the high standard set by the originator of this series.

Bentham's Theory of Legislation. Translated and edited from the French of ETIENNE DUMONT. By C. M. ATKINSON. London: The Oxford University Press. 1914.

Most jurists are no doubt aware that Bentham himself did not write any treatise, nor did he publish any book bearing the title of *Theory of Legislation*. In 1802, a treatise on legislation, civil and criminal, with an Introduction on the general principles of legislation, was published by Dumont in Paris from manuscripts handed to him by Bentham. Sixty years or more later, a translation of certain selected portions of this work was published in England under the title of *Theory of Legislation*. This is the work familiar to English jurists. Dumont, a Swiss pastor, was not an ideal person to whom the exposition of Bentham's ideas and philosophy should have been

entrusted, and his want of knowledge of English law caused him to make absurd mistakes in translating Bentham's language. In the present edition, when access has been possible to the original writings of Bentham, or the same ideas are expressed in other portions of his works, the text has been based on such passages rather than on the presentment of Dumont's exposition in the French edition. The present edition contains in Vol. I the Principles of Legislation and Principles of the Civil Code, and in Vol. II the Principles of the Penal Code. In the reform of the Criminal Law, the influence of Bentham was immense, and his services to legal philosophy transcendent. This influence is yet far from being spent. English jurists will heartily welcome this scholarly edition from the pen of an English lawyer. Whilst officiating as Stipendiary for Leeds, Mr. Atkinson has also found time to write the life of Bentham. As our readers are aware, he is also a valued contributor to this Magazine. To law students, this edition of Bentham's masterpiece is indispensable.

The Law of Partnership. By J. ANDREW STRAHAN, M.A., LL.B., and N. H. OLDHAM, B.A., LL.B. London: Sweet & Maxwell. 1914.

This work principally consists in an admirable explanatory and critical commentary of the Partnership Act 1890. Following the more modern fashion, the learned Authors, whilst not hesitating to give their own opinions where necessary, in some cases in opposition to such an authority as Sir Frederick Pollock, have been content to take their comments from judicial sources. The old practice was to incorporate in the text a garbled or epitomised version of judicial decisions. This practice is discarded here. The *ipsissima verba* of such passages from a judgment as are pertinent are given, and each section of the Act is illustrated where possible from the facts of actual decisions. This is as it should be, and in this manner we get as near to a code of the law, as it actually is in practice, as it is possible to get. Two Appendices are added to the text. The first contains all the English legislation on the subject of Partnership and the Rules of the Supreme Court as to actions by and against partners. The second consists of the provisions of the Indian Contract Act 1872; the Indian Trusts Act 1882, and the Indian Companies Act 1882, so far as they relate to partnerships in India. Practitioners in each country have much to learn from the other which will be found extremely valuable in practice, as the present writer knows from

experience. Although both the learned Authors are, we are told, jointly and severally responsible for the whole book, the work is primarily that of Mr. Oldham.

Codification in British India. By BIJAY KISOR ACHARYYA, B.A., LL.B. Calcutta: S. K. Banerji & Sons. 1914.

This book consists of the Tagore Law Lectures delivered by the learned Author when Tagore Law Professor at Calcutta University in 1912. Whilst a plea for further codification in British India, where the present Anglo-Indian Codes have been claimed by high authority to have been triumphantly successful, the learned Author does not pretend that codes are the last word. As was well said by Domat, codes "cannot regulate the time to come so as to make express provisions against all inconveniences, which are infinite in number." Where codes do not pretend to be exhaustive, their rules must be interpreted in the light of natural justice: in other words, according to justice, equity and good conscience. This, it is true, gives rise to judge-made law, but the evil of an ever accumulating mass of Case law may be met by frequent revisions and amendments. Although the Criminal law and some branches of Civil law, such as "contract" and "civil procedure," have been codified for British India, a large portion of substantive Civil law is still uncodified. The suspension of codification during recent years has been deliberate. It was found that the foundation on which the existing Anglo-India Codes had been reared would not bear the codes of the personal laws of the natives, and that, for the production of such codes, *e.g.*, of Hindu and Mahommedan law, the legislative machinery must be improved. In the present lectures, the learned Author seeks to show the causes which led to the early codes and how far they were desirable and practicable: to examine the principles of codification as applicable in British India; to show how the objections to codification were met; to trace the causes which led to their suspension; to ascertain how and to what extent such causes may be removed, and whether the codification of the personal laws of Hindus and Mahommedans is practicable. All these problems are discussed with a wealth of learning and display of ability of the highest order.

Polarized Law. By T. BATY, D.C.L., LL.D. London: Stevens & Haynes. 1914.

This book represents the substance of three lectures on conflicts of law, delivered by Dr. Baty at the University of London. These

lectures deal with certain disputable and neglected points of Private International law, and they are distinguished by that freshness and originality of thought which we have come to expect from Dr. Baty's facile pen. We cannot recall any juristic writer since the late lamented Professor Maitland who is endowed with quite the same faculty as Dr. Baty of driving the sap of life through the dry bones of legal phenomena and rendering a discussion of legal principles as of absorbing interest to a layman as that of the latest successful play or novel. His humour, too, is delicious. We have been told to regard the law as a tree with its roots planted in the conscience of the people; but, says Dr. Baty, to the average Englishman "the law resembles not a tree but a hat-stand—a useful appendage of books and pages, not inartificially framed, and not always entirely inexpensive." Dr. Baty's choice of a title will not, we think, find ready acceptance from the legal profession. No doubt the definition of this branch of the law will be easily grasped by the scientist, but the average lawyer will be puzzled by this analogy to the mathematical conception of polarity. Conflict of laws is a well-known definition which everyone understands. As an illustration of Dr. Baty's independence of thought, we may point to his rejection of the Continental doctrine of *Renvoi.* With Westlake's justification, based on narrow technical limitations, he will have nothing to do. It is, he declares, "a doctrine much more suited to the hard and fast conception of Private International law as a set of rules based on the rigid theoretical tie of nationality than to the elastic conception of it as a set of rules based on practical convenience." With the decision in *In re Johnson* (L. R. [1903], 1 Ch. 821) Dr. Baty entirely disagrees. The Appendix contains a translation of several of the Hague Private Law Conventions, not hitherto accessible in an English form, which adds greatly to the value of this masterly contribution to some of the most perplexing problems which the domestic and commercial intercourse between nationalities present.

The Department of State of the United States: Its History and Function. By GAILLARD HUNT, Lit.D., LL.D. London: Oxford University Press. 1914.

The purport of this work is to show the formation and development of the Department of State and wherein consists its principal functions to-day and in the past. The Author is not

concerned with the diplomatic history of the United States or the careers of successive Secretaries of State. He deals with the machine of which the foreign service is a part and the movement of which the Secretary of State directs. Long service in the Department has enabled Dr. Hunt to speak with authority upon the practical working of this branch of the Executive Departments, and his statements in the text are invariably supported by references to the appropriate statutes, orders or regulations. Curiously enough, this is the only historical study of one of these Departments which has yet appeared. An early instance of "graft" is afforded by the statutory requirement for printing new statutes in the public press. The selection of newspapers was left to the Secretary of State, and only those which favoured the administration were selected. By the Act of 1874 this method of publication was abandoned.

Oxford Studies in Social and Legal History. Edited by PAUL VINOGRADOFF, D.C.L. Vol. IV. *The History of Contract in Early English Equity.* By W. T. BARBOUR. *The Abbey of Saint Bertin and its Neighbourhood, 900–1350.* By G. W. COOPLAND. Oxford: The Clarendon Press. 1914.

The history of Contract has been so much discussed by so many of our legal historians and leading jurists, both in the United States and in England, that it would appear that little more remained to be said. But, since the material upon which this study of the functions of the Chancery in the fifteenth century is based is new and has never been published, Mr. Barbour has no need to apologise for the present undertaking. As Professor Vinogradoff points out, the Court of Chancery only gradually differentiated from the King's Council. The writs of Edward III's reign were generally framed in terms which left it undecided whether proceedings were to be taken by the King's Council or by the Council under the chairmanship of the Chancellor himself with or without assessors. By the time of Richard II, however, the personal jurisdiction of the Chancellor had acquired a fairly definite range and was assuming the aspect of an established institution. Mr. Barbour's object is to show, not only what took place in the Chancery when the parties to contractual transactions applied to it for a remedy, but also to determine, as far as possible, the principles upon which the Chancellor proceeded. The main purport of his essay is to trace the development of contract in equity, but since it is impossible to consider equitable doctrines

by themselves, they are contrasted with those of the Common law. Accordingly Mr. Barbour has prefaced his main thesis with a brief review of the history of the Common law, which purports to be nothing more than a summary of the work of previous writers. None the less it is an admirable piece of work. Mr. Barbour's contribution to original research, however, is to be found in his treatment of the petitions in Chancery. The Chancery proceedings from the reign of Richard II to that of Richard III number no less than 100,000 pieces. Plunging into this mass of materials, Mr. Barbour has collected a sufficient number of instances upon which to frame his conclusions as to the average methods of Chancery in trying contract cases. We join with Professor Vinogradoff in hoping that Mr. Barbour will follow up his researches by giving us the results of an inquiry into the connection between the views held by the Chancellors and the doctrines of Canonists and Civilians.

Mr. Coopland commences his monograph upon the possession of the Monastery of St. Bertin with a late Carlovingian Survey, the *Breviatio* of 850. From this he is enabled to give with some fulness the economy of those villas, which formed part of the estate of the Abbey, as units of rural exploitation. Founded in 640, the Abbey gradually acquired landed property of considerable area lying between Étaples, on the Somme, to Poperinghe, near the Scheldt, and from the Channel coast, near Blanc Nez, to Thèrouanne, south of St. Omer. It is with the villages lying within a radius of fifteen miles from the latter town, known as the *Sinus Itius* or Gulf of St. Omer, that this monograph is concerned. It is the economic history of a district partly reclaimed from the sea and partly from a state of decay, by the action of a great ecclesiastical institution and by the advent of peasant settlers, who had to pay various dues and to render diverse services, but who eventually acquired a tenant-right almost as secure as ownership. Mr. Coopland's intimate knowledge of the topography and natural conditions of the district, united with laborious research work into the archives of Northern France, has enabled him to trace the stages of this process with the exact details demanded in the successful exposition of the true factors in social development. It is by studies of this kind that, as Professor Vinogradoff declares, precise knowledge, and well-founded generalisations may be substituted for the hazy outlines hitherto furnished by historians of the agricultural proletariate.

Philosophy of Law. By JOSEF KOHLER. Translated from the German by ADALBERT ALBRECHT. With an Editorial Preface by ALBERT KOCOURCK, with Introductions by ORRIN N. CARTER and WILLIAM CALDWELL. Boston: The Boston Book Company. 1914.

Edited by the Editorial Committee of the Association of American Law Schools, this book forms Vol. XII of the Modern Legal Philosophy Series. In noticing the earlier volumes of this remarkable series, we stated that the chief purpose of the Committee is to present to the Anglo-American race the most representative views of modern writers in jurisprudence and the philosophy of law. Professor Kohler was born at Offenburg in 1849. He is said by an eminent American writer to be unquestionably the first of living jurists. With an incomplete knowledge of his works, we naturally hesitate to accept this high valuation, but the most cursory examination of this volume will be found sufficient in placing Professor Kohler in the first flight of the legal writers of the age. The leader of the neo-Hegelians, Kohler's creative fertility has been extraordinary. The Index of his writings contains no less than 526 separate titles, and this amazing proof of industry is equalled by the quality of his contributions. "A pioneer in comparative legal history, he has," says Mr. Roscoe Pound, the American writer above referred to, "made himself an authority, not merely upon the general subject, but upon more than one special branch and upon the legal history of more than one primitive people. At the same time, he has made himself an authority upon such specialised subjects of dogmatic law as the law of bankruptcy and patent law; has made important contributions to modern criminalistic; has written a text-book of the German Civil Code, and has taken the lead in the most active and most widely accepted movement in the modern philosophy of law. No one else has come so near to taking all legal knowledge for his province. No one, therefore, is so well prepared to reduce all legal knowledge to a system." And record does not end here. In many other fields of specialised effort Kohler is accepted as an authority. On such diverse subjects as folk-lore, music, painting, poetry and history Kohler has left his mark. The volume here rendered into English is the *Lehrbuch der Rechtsphilosophie*, published in Berlin in 1909. It does not however disclose a complete statement of Kohler's philosophical position, nor indeed is such a statement to be found in any of his works. Anything like a self-contained metaphysical system is entirely absent,

since he accepts Hegel's *Phenomenology of Spirit* as the basis of his philosophy. But although Kohler bases his system, so far as it is a system, upon the fundamental provisions contained in the Hegelian doctrine, he does not do so blindly. He appropriates the essence of Hegel's ideas without taking over the dry form of his too abstract methodical process. And although he names Hegel as his master, he only does so with qualifications. The illustrious ideas of Hegel, he says, can only be accepted "with proper correction." Thus, what in Hegel is too abstruse or too artificial he discards. The dominating factor in Kohler's system is evolution. He energetically rejects a fixed standard of justice as applicable to all people at all times. There is no such thing as eternal law. The philosophy of law, he says, is a branch of philosophy, dealing with man and his culture. Culture is the control of nature by science and art, and every culture must be provided with its corresponding and appropriate system of law. This has been defined as "cultural progression." After this introduction to philosophy of law, Kohler deals with the law of the individual and the body politic. Under this he considers the law of persons and the law of property. Family law is a division of the former. Property law is divided into the law of ownership and of obligations, and a third division, "property as a whole" is added, under which the law of inheritance is specially treated. The law of the State and of Nations falls under the division of the law of the body politic. In the Appendices will be found two criticisms, one by Professor Adolf Lasson *Kohler's Philosophy of Law*, and the other by Professor J. Castillejo y Duarte, *Kohler's Philosophical Position.*

The Chancery of Lancashire Practice, containing the Statutes, Orders, Rules and Regulations affecting the Jurisdiction and Practice of the Court of Chancery of the County Palatine of Lancaster, with Notes. By JOHN BENNETT, M.A. Manchester: Sherratt & Hughes. 1914.

At what precise moment Lancashire became a county, and when it acquired palatinate jurisdiction has still to be determined. Although apparently the *county* of Lancaster, as distinguished from the *honour*, did not come into official recognition till about 1194, the *honour* enjoyed some of the attributes of royalty under William shortly after the conquest and probably under his predecessor. With the charter of 1351, however, the palatine jurisdiction in all its fulness was conferred by Edward III. From this period, as the records of the Palatine Courts now in the record office, commencing

with the first Palatinate of Henry Duke of Lancaster show, the Chancery of the County Palatine dates.

This Court, which must be distinguished from that of the Duchy Chamber of Lancaster to which appeals lay, has exercised jurisdiction as a Court of Equity since 1351. It followed the High Court of Chancery in its development of equitable principles, and framed its procedure largely on that of the High Court. With the extension of the powers of the High Court of Chancery similar powers were conferred by the Chancery of Lancaster Act 1850 upon the Court, and its jurisdiction enlarged by subsequent Acts. In spite of this attempted co-ordination, or rather perhaps in consequence, differences in the extent of the jurisdiction and in certain respects in the practice of the two Courts arose, which have rendered it impossible to rely entirely on the books dealing with the practice of the High Court. It was to meet this want that the present work was planned and in part written, by Mr. J. Herbert Cunliffe, K.C., who, upon taking silk, handed over his MS. and material to Mr. Bennett for completion and publication. The Introduction contains a short and interesting sketch of the origin of the Court's jurisdiction and a description of the present jurisdiction and practice. This is followed by the full text of the Chancery of Lancaster statutes annotated, whilst Part III sets forth the Orders and Rules of the Palatine Court. Part IV contains Forms: Part V, Orders as to Court Fees and Solicitors' Costs, etc.; and Part VI deals with Rules issued under particular Statutes. In those cases where the Rules of the Palatine Court are the same as the Rules of the Supreme Court, no note is appended to the Palatine Rule, but a reference is given to the corresponding Rule in the Rules of the Supreme Court. Where, however, the Rules or practice differ, notes are given. The notes of the cases decided by the late Vice-Chancellor Hall were personally revised by him and approved. It is curious to note the provisions for a trial by jury.

Bowstead's Forms and Precedents. By W. Bowstead and M. R. Emanuel, M.A., B.C.L. London: Sweet & Maxwell. 1914.

The numerous precedents which make up the two volumes of this work, would, with the well-known collections on Conveyancing and Company law, constitute a library adequate to meet the demands, in all except practice forms, which are likely to be made on any practitioner. They are not merely selections, but are an array which

is nearly exhaustive over a range which extends from bills of lading to separation deeds, and even to the forms which an auctioneer could require in any of the multifarious things which are transferred by the fall of the hammer. And they are not merely skeletons, but full forms. So that they afford to the inexperienced the wealth which long experience has garnered. The work is undoubtedly a conscientious, painstaking, and thoughtful production.

The Annual Practice 1915. By J. B. MATTHEWS, K.C., R. WHITE, and F. A. STRINGER.

The A. B. C. Guide to Practice 1915. By F. R. P. STRINGER. London: Sweet & Maxwell.

The White Book for 1915 makes its appearance at the earliest possible moment under the same able managers who have been so long associated in the editorial department. New Acts and new rules have made necessary many important changes, and these have been effected with considerable skill. For instance, the Bankruptcy Acts from 1883 onward have been almost wholly repealed and consolidated by the new Act of 1914. But as this repealing Act does not come into operation till the 1st of January of next year, the old Acts retain, throughout this year, their full force, and are therefore referred to in the text by their old titles and sections. But any inconvenience which this might occasion before the White Book of 1916 is issued, is excellently met by the numbers of the substituted sections of the new Act being printed on the margin wherever the old Acts are cited. This will be a point of great advantage. Another instance of difficulty surmounted is in the insertion of the rules under the Courts (Emergency Powers) Act 1914. Some of these rules were not obtainable till after the book had been printed. Space seems therefore to have been left for them at the end of Part I, and the paging of Part II proceeded with after an allowance of room for the expected matter, and as the allotment of space for the unknown rules was more than sufficient, a lapse occurs after page 1364; for the next page is 1401. The "urgent" rules passed on 17th July of this year, relating to the long vacation, are of course subject to alteration before the coming of next long vacation. The traditional accuracy of the work seems, from all searches which time has permitted, to be fully sustained. The mechanical parts are not less commendable. The Table of Cases and the Index have been revised, and the colouring of the front page edges afford a swift access to any part sought for.

Mr. Stringer's *Guide to Practice* as a useful auxiliary to the White Book shows undiminished skill and judgment in its compilation and arrangement.

The Yearly Practice of the Supreme Court 1915. By M. MUIR MACKENZIE and T. WILLES CHITTY. London: Butterworth & Co.

With zealous anticipation of professional requirements, this welcome guide to the practice of 1915 is issued by the Editors in the early days of the present sitting. Though no very wide or momentous changes in procedure are effected, all the variations are of course of consequence, and some of them of considerable interest. The rules issued in July last are appropriately placed under Order XXXVI; and with regard to the third of these, the Editors suggest a difficulty as likely to arise. Their forecast will, in its turn, suggest a way by which the difficulty may be encountered. The Postponement of Payments Act 1914, with the proclamations ancillary to it, is set out in a special section of the first volume; in which also is included the Courts (Emergency) Act. The two-volume form of producing the work has some advantages peculiar to itself; and this is aided by the plan of placing in each volume a complete Index to both. As the duplex plan allots to the first volume the Orders and Rules, and to the second the Statutes and Appendices, a relief in portability is attained according as the one or the other has to be consulted in chambers or in Court. The paging is continuous through both volumes; but to meet enlargement of notes, or additions unforeseen, a hiatus, between the final page of the first and the initial page of the second, occurs; but the "solution of continuity" being known, no perplexity ensues. The work has in the past been as near perfection as vigilant care and foresight can reach, and this issue will doubtless be as eminent in this respect as its predecessors.

Stone's Insurance Cases. By GILBERT STONE, LL.B., and K. G. GROVES, LL.B. London: The Reports and Digest Syndicate. 1914.

The aim of the two Authors has been to collect all the English, Irish, Scotch, and Indian cases, and most of the Colonial, in every branch of insurance, except Marine. And not only to collect them but to arrange them in logical order. To this vast assemblage they have also added, on request, all the cases decided up to the early part of this year, on Workmen's Compensation and Employers'

Liability. Such as have been over-ruled have been so indicated. The arrangement of the work is planned with much judgment, and the purpose pursued is to enable a reader to see at a glance both the decisions arrived at and the facts upon which they were founded. This purpose is facilitated by numerous cross-references. The labour in the preparation of the book must have been very great, and the ability with which it appears to have been directed has produced two volumes which will be of much utility. The work is dedicated to the present Attorney-General, with his consent, which probably conveys approbation on his part.

Second Edition. *Law and Public Opinion in England.* By A. V. DICEY, K.C., D.C.L. London: Macmillan & Co. 1914.

This book may be described as a corrected reprint accompanied by a new Introduction: "The object of which is to trace and to comment upon the rapid changes in English law and in English legislative opinion which have marked the early years of the twentieth century." This task, as the learned Author admits, is one of special difficulty. The success or non-success of legislative enactments can in the main only be tested by their ultimate results. In many instances such results are indirect rather than direct, and are long in making their appearance. As he truly says, "few indeed have been the men who have been able to seize with clearness the causes or the tendencies of the events passing around them." Among modern writers of distinction, there only occur to him Burke, Tocqueville, and Bagehot, and even they were not always correct in their anticipations. This Introduction, therefore, "is written under conditions which make it rather an analytical than an historical document, and introduce into every statement which it contains a large element of conjecture." In his treatment, the learned Author has followed the same method as is employed in the text. He treats of (A) The state of legislative opinion at the end of the nineteenth century; (B) The course of legislation from the beginning of the twentieth century: (C) The main current of legislative opinion from the beginning of the twentieth century; (D) The counter currents and cross-currents of legislative opinion during the same period. In carrying out his self-appointed task, the Author obviously endeavours to be strictly impartial, but his own strong political bias has apparently been too much for him. He is evidently hostile to most, if not all, the social measures of the Liberal Govern-

ment since it came into power in 1906. He has nothing to say on the Education and Licensing Acts of the Unionist Administration of 1900 to 1905. He, of course, is perfectly entitled to criticise the Liberal measures from his point of view, but an impartial historian would at any rate make some attempt to state the arguments advanced in their favour. In criticising, for instance, the Education (Provision of Meals) Act 1906, he omits altogether the argument that the State is wasting its money in trying to educate ill-fed children, and that it is in the interest of the State to both educate and feed, if necessary, such children. He also omits to state that the cost of such feeding can be recovered from the parent if he has means. If he has no means, to deprive him of the franchise seems to us a doubtful method of compelling a parent to do his duty. His pauperism may be due to no fault of his own, and to deprive citizens of their political rights because they have been compelled to seek temporary relief from the guardians is regarded by the mass of working men as an injustice, and is certainly not the way to make men respectable members of society. Again, on the question of the magic of individual ownership Dr. Dicey altogether misses the point We say boldly no such magic exists. It is not ownership but security of tenure which mankind desires. Ninety per cent. of the land in Great Britain to-day is in the hands of mortgagees, that is to say, legally it is no longer in the ownership of its ostensible owners. Peasant proprietorship, which he advocates, results always and everywhere in subjection to the money-lender. One third of the peasants' land in India is in the hands of these vampires. Dr. Dicey has written what are admittedly the finest works on Private International law and Constitutional History which have appeared in modern times, but in economic and political theory he is decidedly weak, apparently allowing a naturally broad vision to be blinded by party prejudice.

Second Edition. *The Law relating to the Mentally Defective.* By H. DAVEY. London: Stevens & Sons. 1914.

The treatment of the mentally defective is, unhappily, one of extreme importance to the country; and there has been already issued so large a quantity of official literature relating to it, as to render good text-books on the subject indispensable to any student of the problem. This book, to all appearance, supplies such a requirement. The subject not only concerns the relatives of the

afflicted individuals, and the professional persons whom those relatives must consult, but it also concerns vitally the many bodies which have the administration of the law, such as county councils, poor law, education, and lunacy authorities, and, perhaps, not least, magistrates and police. The Introduction to the work gives a useful elucidation of the general effect of the Act of 1913 and of the principles on which it is founded.

Third Edition. *The Underlying Principles of Modern Legislation.* By W. Jethro Brown, LL.D., Litt.D. London: John Murray, 1914.

It is little more than two years since we reviewed this work at some length, and expressed the opinion that it would rank as the leading text-book on the theory of modern legislation. The appearance of a third edition within such a short period affords some evidence of the correctness of our view. As we then said, the purpose of this book is to state the principles underlying the course of English legislation during the 19th century. These principles, representing the wisdom which lies in the accumulated thought and experience of generations, must, as Professor Brown insists, be made the subject of serious study. "They serve not only to make intelligible the content of that law, which must be understood if it is to be reformed in any worthy sense, but also to provide the social reformer with an intellectual equipment which should be of service in assessing the relative value of the many proposed solutions of existing problems." It is the neglect of the study of legal principles which has so largely rendered abortive that enormous mass of sociological literature which has flooded the market during the last thirty years. Professor Brown again raises the question in the Preface, whether every candidate for a University degree ought not to take the theory of legislation as a subject at some stage in his course. We have no hesitation in agreeing with the Professor, that in view of the increasing democratising of our institutions and the constant widening of the sphere of positive law, this question should be answered in the affirmative. In spite of some complaints from reviewers that the learned Author often failed to indicate his own views as to the best solution of a particular problem, Professor Brown has adhered to his view that the Author of a university text-book ought to be careful in expressing personal opinions upon problems of which the precise solution may be debatable.

Fourth Edition. *A New Guide to the Bar.* By M.A. and LL.B., Barristers-at-Law.

Sweet & Maxwell's Guide to the Legal Profession. London: Sweet & Maxwell. 1914.

The first of these books constitutes a comprehensive guide to the Bar and to the Bar examinations, containing full details of the official regulations, copies of examination papers, and a critical essay on the present condition of the Bar of England. The particulars given relating to the Inns of Court Officers' Training Corps are of special value at the present moment to those members of the legal profession and the universities and public schools who contemplate joining H.M. forces.

The object of the second book is to introduce the law student to the most suitable books for the examinations for the Bar, the Law Society, and the London LL.B. degree.

Fourth Edition. *The Law of Building, Engineering and Shipbuilding Contracts, with Reports of Cases and Precedents.* Two Vols. By ALFRED A. HUDSON, K.C., assisted by C. S. REWCASTLE, LL.B. London: Sweet & Maxwell. 1914.

The long period of seven years which has elapsed since the publication of the third edition of this work has necessitated the greatest amount of revision since the original publication in 1891. Indeed some of the chapters have been entirely re-written. It is satisfactory to learn that, although the subjects dealt with have been increased, chapters added, fresh cases cited, and forms and precedents added to, it has been found possible to incorporate this additional matter without materially increasing the size of the work. As might be expected, judicial decisions, since the last edition, have been very numerous; these, it is true, have not effected any serious changes in the law, but, none the less, they are valuable as throwing new light on matters of the highest importance to those connected with Engineering and Building, and with the business of Surveyors and Valuers. The learned Author has continued his practice of including, in his digest of cases, reports of cases unreported elsewhere. This has formed the subject of criticism from some of his critics. For our part we think this practice fully justified, and we are confirmed in our opinion by the learned Author's account in the text of the case of *Roberts* v. *Hickman & Co.* This case was unreported, when the learned Author (having himself prepared a report in manuscript) had occasion to cite it in an

arbitration case in which he was engaged. This report in MS. was borrowed by the Court of Appeal for use during the case of *Aird* v. *Bristol Corporation*, when the learned Author was requested to publish it. From the history of this case, we assume that these unreported cases were actually reported by the Author himself or by some duly qualified counsel. Their authority would be enhanced and, indeed, placed upon the same footing as cases reported in the Law Reports, if the names of the Barristers reporting them were attached. Vol. II, we may note, is wholly concerned with Reports of Cases, and with Forms and Precedents. This is of especial value to those practitioners in the provinces who have not access to a law library. The great improvement which has taken place in this edition should render it even more valuable to practitioners generally than its predecessors.

Eighth Edition. *Lumley's Public Health Acts.* By A. MACMORRAN, M.A., K.C., and J. SCHOLEFIELD, assisted by G. R. HILL, M.A., and K. M. MACMORRAN, M.A., LL.B. London: Butterworth & Co. 1914.

The first edition of this work was given to the world by the late Mr. W. G. Lumley, Q.C., who was the Counsel to the Local Government Board, assisted by his son Mr. Edmund Lumley, afterwards for many years a member of the staff of the Law Reports. They were only responsible for that Edition. The second and third were edited by the late Mr. W. Patchett, Q.C., and Mr. Alexander Macmorran, who has continued to be the principal Editor, with different coadjutors down to the present time; the book has grown enormously in bulk, and its original Editors would hardly recognise it as their offspring. It is now contained in two bulky volumes, each consisting of 1300 pages of text, to which are added 370 pages made up of Table of Contents, Table of Cases and Table of Statutes, and an Index containing 232 pages more. The Index is bound up with each volume. There are thus over 1200 pages in addition to the text proper. In the first volume the statutes directly dealing with Public Health and Local Government are set out in full. The second contains a miscellaneous collection of Acts, more or less connected with these subjects, beginning with the Knackers Act 1786 and ending with the Ancient Monuments Amendment Act 1913, 865 pages. The relation of some of them to Public Health appears rather distant. Then follow orders of the Local Government Board, and other

Government Departments dealing with various matters. They are voluminous, 444 pages, but in a collected form are not easily accessible elsewhere, and so are properly included in this book. The scheme of the work continues as it was at first. It sets out the text of the various Public Health Acts now in force, beginning with the Consolidation Act of 1875, appending to each section notes giving the effect of the various cases in which those sections, and others more or less relating to the same matters, have been considered by the Courts, and calling attention to other sections relating to the same matter. Cases reported up to July 19th are dealt with. As far as a necessarily somewhat cursory perusal of some of these notes enables one to form an opinion, the effect of the decisions is given accurately; but the notes are often so voluminous that it is a labour of considerable difficulty to ascertain their meaning. The Editors are apparently mindful of the old line, "*Brevis esse laboro obscuros fio,*" and have certainly avoided that pitfall. They say in their Preface that it would have been possible to condense many of the notes by merely stating the principles apparently deducible from the cases cited, but that they "were reluctant to depart from the plan of giving in some detail the facts of the various cases, having regard to the fact that the book is often used in places where law reports are not easily procurable, and by readers who find it helpful to see how general principles have been applied by the Courts in concrete cases." This, of course, explains their reason for perpetuating the old arrangement. But what was convenient when the book was small, ceases to be so now that it has grown to its present size. These volumes are inconveniently large for an advocate to take into Court, and for use in chambers would generally be more helpful if they stated principles more definitely.

The law affecting matters relating to Public Health and Local Government can probably be always ascertained from a careful perusal of these tomes, but not always much more readily than from an equal amount of labour devoted to the statutes themselves and the reported cases, aided by a digest to direct one's inquiries to the right quarter. A lawyer whose studies or practice have made him acquainted with this branch of the law, can with trouble and care find his way through this confused mass of statutes and cases by either method. But if he has not already a knowledge of the subject, he must not expect from the accumulated information contained in these volumes, to find an immediate answer to the

question with which he is concerned. The difficulty of making a reliable treatise on a subject so large as that dealt with in this book —where fresh legislation and fresh decided cases are yearly being added to render existing confusion more confounded—is great. A fresh consolidating statute, on the lines of the Act of 1875, is badly needed. Till such an Act is passed, Lumley's Public Health Acts will remain a standard text-book on the subject. The matter now dealt with does not lend itself readily to the original form of the book; but as that form has been retained, the Editors may certainly be congratulated on having brought it up to date, and on having produced a new edition which will maintain the reputation of those which preceded it.

Encyclopædia of the Laws of England. Vol. XVI. Edited by MAX. ROBERTSON. London: Sweet & Maxwell. 1914.—This volume constitutes the Annual Supplement to the second edition of the Encyclopædia, which contains the amendments of and the additions to the law from 1906, the date of publication of the second edition, to the end of 1913. In the volume before us the arrangement of the main work has been followed. References to the former volumes are given throughout, the number of the page appearing opposite each entry. Intended primarily to bring up to date the original work, this volume at the same time forms a digest of the statutes and cases during the period covered. Precedents of Wills, which were crowded out of Vol. XV, find a place under the title of Will. An adequate Index has been added. The volume is indispensable to those possessing the main work.

Scintillæ Juris and Meditations in the Tea-room. By the Hon. Mr. JUSTICE DARLING. London: Stevens & Haynes. 1914.—These sparks from a brilliant mind, which to many other minds have in particles long ago conveyed delight, are now combined in one constellation for the revival of an old remembrance.

Handbook of Legal Proceedings Abroad. By H. A. MÖLLER and HARRI WOLFF. London: G. Salby. 1914.—This small volume is compiled by various foreign experts, and is printed in French and German with an English rendering. It applies to the European countries and the United States of America, and to Egypt, Brazil, Cape Colony, and the Balkan States. It is undoubtedly a laborious

work, but it is not of an exhaustive nature. The portion devoted to England, in the English version, is five pages.

The Temple. By HUGH H. L. BELLOT. London: Methuen & Co. 1914.—This is one of the best of the smaller guide books to the Temple, for it is written from an inner knowledge and is full of antiquarian and biographical anecdotes.

Third Edition: *An Analysis of Williams on Real and Personal Property.* By A. M. WILSHERE, M.A., LL.B. London: Sweet & Maxwell. 1914.—The Author modestly publishes the warning that the work "is a note-book and nothing more." But it is a concise and skilful note-book, and even to a careful student of *Williams*, who robustly adopts the rarely followed plan of making his own analysis from memory after he has read and digested a chapter, it would be a valuable and corrective support; for this is a third edition and the Author is a master of his subject.

Fourth Edition. *Elements of the Law of Contract.* By A. T. CARTER. London: Sweet & Maxwell. 1914.—It is now four years since the appearance of the last edition of this most admirable introduction to the law of contract. For an illustration of Dr. Carter's original methods of dealing with a hackneyed subject, we may refer the student to his definitions of "inferred," "implied," and "quasi-contract." We are not sure that we wholly agree with Dr. Carter's conclusions, but there can be no question of the value of thus stimulating the student to think out the problem for himself. We are still puzzled with the use of italics in the Table of Cases. We assume they are intended to indicate the leading cases, but there is nothing to suggest the reason. In the section dealing with contracts in restraint of trade, we miss any reference to the recent important case of *Mason* v. *Provident Clothing & Supply Company* (L. R. [1913], A. C. 724), decided in the House of Lords.

Eighth Edition. *Seaborne's Law of Vendors and Purchasers of Real Property.* By W. A. JOLLY, M.A., and W. G. HART, LL.D. London: Butterworth & Co. 1914.—Of this old established work, the reputation which was founded on its original accuracy and supported by later issues will be confirmed by the present edition, which preserves the well-considered division of the subject. Such a preservation of design is convenient for those who are familiar with any of

the earlier copies. Though the compass of the treatise is somewhat restricted, it is a very important one. Since the preceding issue, Acts and Rules of consequence have come into existence, such as the Land Transfer Rules 1908, the Finance Act 1910, the Conveyancing Act 1911, and the Bankruptcy Act of last year. All that is pertinent in these, and in the principal decisions on the topic down to May last, have been inserted, so that the volume is sure of acceptance.

Thirteenth Edition. *Alpe's Law of Stamp Duties.* By A. R. RUDALL and H. W. JORDAN. London: Jordan & Sons. 1914.—The stamp duties are a complicated subject, but they have one alleviating aspect, for whatever dubiety there may be about the construction of the Acts of 1890, the words are interpreted by their simple meaning. The intention of the Legislature is not investigated by the Courts, and as the two Acts of that year are set out in the text, the reader has so far a placid course. But the subsequent Revenue and Finance Acts down to 1912 have repealed or amended certain sections of the principal Acts. These, however, and the ruling decisions on the whole subject, are clearly represented in the notes; so that to any question on this branch of the law, the book will supply a complete and reliable answer.

Books received, reviews of which have been held over owing to want of space:—Bolland's *Select Bills in Eyre, A.D. 1292–1333*; Fraser's *Law of Torts*; Burrows' *The Law of Income Tax relating to Business Profits*: Gow's *Sea Insurance*; Davies' *The Finance (1909–10) Act 1910*; *Key and Elphinstone's Precedents in Conveyancing*; Jenks' *Digest of English Civil Law, Book III, Sections 12—17*; Anderson's *The Criminal Justice Administration Act 1914*.

Other Publications received:—*Why we are at War* (Clarendon Press, Oxford); *Status of the International Court of Justice* and *Justice between Nations* (Society for Judicial Settlement of International Disputes, Baltimore, U.S.A.); *Calendar of London School of Economics*; Scott's *The Effect of War on Contracts* (Stevens & Sons); *Cambridge Pocket Diary 1914-15* (Cambridge University Press).

The *Law Magazine and Review* receives or exchanges with the following amongst other publications:—*Juridical Review*, *Law Times*, *Law Journal*, *Justice of the Peace*, *Law Quarterly Review*, *Irish Law Times*, *Australian Law Times*, *Canada Law Journal*, *Canada Law Times*, *Chicago Legal News*, *American Law Review*, *American Law Register*, *Harvard Law Review*, *Case and Comment*, *Green Bag*, *Madras Law Journal*, *Calcutta Weekly Notes*, *Law Notes*, *Law Students' Journal*, *Bombay Law Reporter*, *Medico-Legal Journal*, *Indian Review*, *Kathiawar Law Reports*, *The Lawyer* (India), *South African Law Journal*.